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ARTICLE

THE GOVERNMENTAL INTEREST APPROACH TO CHOICE OF LAW: AN ANALYSIS AND A REFORMULATION

Robert A. Sedler*

INTRODUCTION

The governmental interest approach formulated by the late Brainerd Currie¹ has been the catalyst of the modern "revolution" in choice of law in this country.² This revolution has resulted in the widespread abandonment of the rigid, territorially based rules of the original *Restatement*³ in favor of a view of choice of law that emphasizes considerations of policy and fairness to the parties.⁴ Virtually all modern approaches to choice of law recognize the relevancy of the policies and interests of the involved states;⁵ the

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1. Currie's major articles have been collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter cited as CURRIE]. Two other articles published subsequently are Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROBS. 754 (1963); Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89 [hereinafter cited as Currie, *Full Faith and Credit*]. The basic elements of Currie's approach are summarized in R. CRAMPTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 221-24 (2d ed. 1975) [hereinafter cited as CRAMPTON, CURRIE & KAY].

2. As Professor John P. Dawson put it, when presenting Currie with the first Order of the Coif Triennial Award, "It seems clear that after Brainerd Currie, that dark science called the conflict of laws can never be the same." *TIME*, Jan. 8, 1965, at 42-43.

3. Some courts, however, have refused to join the "revolution." See CRAMPTON, CURRIE & KAY, *supra* note 1, at 247-48; Sedler, *Rules of Choice of Law Versus Choice of Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. —, —, n.2 (1977) (currently awaiting publication) [hereinafter cited as Sedler, *Rules of Choice of Law*].

4. For a discussion of the meaning of the policy-centered approach, see Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27, 57-61 (1967) [hereinafter cited as Sedler, *Babcock v. Johnson in Kentucky*]. While I consider the basic structure of the *RESTATEMENT SECOND* to represent a "rules approach" rather than a policy-centered one, *id.* at 61-63, there is a "policy component" to that approach, which, in practice, may have turned it into a "flabby amorphous product." See note 58 *infra*.

5. Professor Ehrenzweig's "proper law in a proper forum" approach is based on considerations of policy, but Ehrenzweig denies the relevance of "state interests." His approach is summarized in CRAMPTON, CURRIE & KAY, *supra* note 1, at 306, and was the subject of a symposium in 18 OKLA. L. REV. 233-375 (1975), which includes a restatement of the approach by Ehrenzweig. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965).

disagreement is over how much weight they are to be given in comparison with other considerations,⁶ and over whether the resolution of conflicts problems should proceed case by case, as would follow from Currie's approach, or on the basis of narrow, policy-based rules.⁷

Currie's approach with its insistence that choice of law decisions be made solely with reference to the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue, was attacked at the time it was formulated,⁸ and continues to be attacked by commentators today.⁹ Yet, as this Article will demonstrate, Currie's approach is, in fact, usually applied today by courts committed to a policy-centered view of choice of law, even when they are purporting to apply a different approach¹⁰ and even though Currie's formulation was not designed for use in the process of deciding actual cases.¹¹ Currie's approach was developed from an academic perspective,¹² and the methodology was designed to enable students and legal scholars to analyze conflicts problems in their entirety. Further, it was developed against the background of the rules approach of the original *Restatement* as a basic alternative to that methodology.¹³ Finally, Currie's tragically early death prevented further refinement of his approach, and particularly precluded his response to the choice of law revolution that was just beginning when he died.¹⁴

For all of these reasons, it now appears appropriate to analyze, reformulate and, in a sense, simplify Currie's methodology for use by the courts in the process of deciding actual cases. The Article

6. This appears particularly in regard to Leflar's choice-influencing considerations and Trautman and Von Mehren's functional analysis. See note 219 *infra*.

7. See notes 166-80 & accompanying text *infra* (discussion of narrow policy-based rules).

8. See, e.g., Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS, 91, 180-89 (1964); Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 632-68 (1962).

9. See, e.g., Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 557-61 (1971) [hereinafter cited as Reese, *Chief Judge Fuld*]; Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 316-19 (1972) [hereinafter cited as Reese, *Rules or Approach*].

10. See notes 278-87 & accompanying text *infra*.

11. *The Verdict of Quiescent Years*, in CURRIE, *supra* note 1, at 585-86 (article originally published at 28 U. CHI. L. REV. 258 (1961)).

12. *Id.* at 585.

13. If some of Currie's writing seems ponderous today, and if it seems that often he is "stating the obvious," this is only because the battle has long since been won, completely in academic circles, and to a large extent in the courts. This was not so, of course, at the time that Currie wrote.

14. Currie died in 1965. The "revolution" is generally considered to have begun with *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

will begin by summarizing the theory of Currie's approach and the methodology which he formulated for its application. It will then discuss and respond to the criticisms that have been directed against interest analysis. In this context, other basic approaches to choice of law, specifically the approaches of territorialism and of narrow, policy-based rules, will be examined. Criticisms of Currie's resolution of the "true conflict"¹⁵ will then be discussed. The concluding portion of the Article will be devoted to the reformulation of Currie's methodology.

I. CURRIE'S GOVERNMENTAL INTEREST APPROACH: UNDERLYING THEORY AND METHODOLOGY

The underlying theory of Currie's governmental interest approach is that choice of law problems should be resolved by a consideration of first, the policies behind the laws of the involved states, and second, the interest of each state, in light of those policies, in having its law applied on the particular issue as to which the laws differ.¹⁶ The factual contacts¹⁷ that the parties and the transaction have with the various states do not have independent significance, and are relevant only insofar as those contacts give rise to a governmental interest in having a particular rule of substantive law applied on a particular issue.¹⁸

The methodology of interest analysis first directs scrutiny of the content of the differing laws of the forum and of the other state or states whose law is potentially applicable.¹⁹ The content of each state's law will reflect a policy. The second determination, then, is whether, in light of the policy reflected in that law, the state has an interest in having its law applied on the point in issue.²⁰ Currie

15. See notes 48-52 & accompanying text *infra*.

16. It also proceeds on the assumption that the basic law is the law of the forum. See generally *On the Displacement of the Law of the Forum*, in CURRIE, *supra* note 1, at 3 (article originally published at 58 COLUM. L. REV. 964 (1958)).

17. A factual contact may be defined as a contact involving the substantive claim, e.g., in an accident case, the accident itself or the point of origin of the trip that resulted in the accident.

18. *Conflict, Crisis and Confusion in New York*, in CURRIE, *supra* note 1, at 727-28 (article originally published at 1963 DUKE L.J. 1). Currie demonstrates the difference between interest analysis and the "grouping of contacts" approach of the *Restatement Second* by a discussion of *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961). *Id.* at 728-36.

19. They will be referred to as the other involved states. We will generally use the two-state example, because this is what usually occurs in practice. A state's law is potentially applicable for conflicts purposes whenever one of the parties resides there or whenever some of the legally significant facts occurred there.

20. The methodology is summarized in *Notes on Methods and Objectives in the Conflict of Laws*, in CURRIE, *supra* note 1, at 183-84 (article originally published at 1959 DUKE L.J. 171), and in CRAMTON, CURRIE, & KAY, *supra* note 1, at 221-24. It should be noted that the interest referred to is the interest of the state in having its law applied in the kind of situation that is before the court. Where special circumstances are present in the actual case that ordinarily are not present in that

illustrated the application of interest analysis by a detailed consideration of the problem of married women's contract immunity involved in *Milliken v. Pratt*,²¹ and the problem of survival of actions presented by *Grant v. McAuliffe*.²² While fuller consideration of these cases will be left for later discussion,²³ a review of Currie's method of determining preliminarily the existence or non-existence of a governmental interest should be helpful at this juncture.

In *Milliken*, a Massachusetts married woman entered into a contract with a Maine creditor in Maine,²⁴ by which she agreed to stand surety for the debt of her husband. The contract was valid in Maine, but would have been void in Massachusetts by reason of that state's statute protecting married women from liability on such contracts. In analyzing the policies and interests of the involved states, Currie first asked whom Massachusetts was intending to protect when it chose to subordinate its general policy of enforcing contracts to a specific policy of shielding married women from liability on surety contracts for the debts of their husbands.²⁵ Since the Massachusetts legislature would not presume to decide whether married women from Maine or any other state needed such protection, the women with whose welfare it was concerned were obviously Massachusetts married women.²⁶ Thus, Massachusetts had an interest in applying its law to implement its protective policy for the

kind of situation, the interest is still deemed to exist for purposes of Currie's interest analysis.

For example, Currie sees the state where an accident occurred as having an interest in allowing a non-resident injured there to recover, because in the absence of such recovery, the non-resident might be unable to pay medical and hospital bills owed to resident creditors or might become a public charge. This interest is deemed to be present in every case where a non-resident is injured in the forum, and it would not matter in the particular case that the non-resident was immediately removed to a hospital in his home state. *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in CURRIE, *supra* note 1, at 205, 366-75 (article originally published at 26 U. CHI. L. REV. 9 (1958)).

21. 125 Mass. 374 (1878). See generally *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in CURRIE, *supra* note 1, at 77 (article originally published at 25 U. CHI. L. REV. 227 (1958)).

22. 41 Cal. 2d 859, 264 P.2d 944 (1953). See generally *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in CURRIE, *supra* note 1, at 128 (article originally published at 10 STAN. L. REV. 205 (1958)).

23. See notes 38-52 & accompanying text *infra*.

24. Under the "place of contracting" rule the contract was considered to be made in Maine because the "last act," i.e., the giving of the credit in reliance on the guaranty, occurred there. However, the factual contacts with Maine were such as to justify the conclusion that the contract was "centered" there.

25. For a discussion of "domestic subordination," see *The Verdict of Quiescent Years*, in CURRIE, *supra* note 1, at 610 (article originally published at 28 U. CHI. L. REV. 258 (1961)).

26. *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in CURRIE, *supra* note 1, at 85-86 (article originally published at 25 U. CHI. L. REV. 227 (1958)).

benefit of a Massachusetts married woman irrespective of where the creditor resided or where the contract was made.²⁷ Maine's policy, on the other hand, was to promote security of transactions, and Maine had an interest in applying that policy for the benefit of the Maine creditor. Thus, in *Milliken* each involved state had an interest in applying its law in order to implement the policy reflected by that law.

In *Grant v. McAuliffe*,²⁸ a California victim and a California tortfeasor were involved in an Arizona accident in which the tortfeasor died. Under California law, the cause of action survived the death of the tortfeasor; under Arizona law it did not. The policy behind the California rule obviously was to protect the victim and to prefer the victim's interest over the interest of the tortfeasor's estate.²⁹ As Currie put it: "California has an interest in the application of its law and policy whenever the injured person is one toward whom California has a governmental responsibility."³⁰ This interest would extend to a California plaintiff injured in Arizona. In discussing the Arizona rule of non-survival of actions, Currie emphasizes the need to determine a rational policy. He deemed legislative motivation—inertia or response to the pressures of the insurance lobby, for example—irrelevant in determining a state's policy for purposes of interest analysis:³¹ "The business of courts in conflict-of-law cases is not to judge the policies of the states, but to ascertain them and give them effect, so far as possible, when there is a legitimate basis for effectuating them."³² Currie found the most rational policy basis for the Arizona rule to be that the "living should not be mulcted for the wrongs of the dead."³³ Another possible policy would be protecting the decedent's insurer from liability whenever the insured died in the accident.³⁴ In any event the policy behind the Arizona law protects those interested in the estate of the decedent and, we will assume, insurers of Arizona drivers. Since the deceased was a California domiciliary,³⁵ and the

27. *Id.* at 86-87.

28. 41 Cal. 2d 859, 264 P.2d 944 (1953).

29. *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in CURRIE, *supra* note 1, at 143 (article originally published at 10 STAN. L. REV. 205 (1958)).

30. *Id.* at 144.

31. Legislative motivation generally is irrelevant in other contexts. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968).

32. *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in CURRIE, *supra* note 1, at 144 (article originally published at 10 STAN. L. REV. 205 (1958)).

33. *Id.*

34. *Id.* at 160.

35. Since the deceased's heirs would be claiming on the basis of his status as a California domiciliary, it would not matter where the heirs themselves were domiciled.

automobile was insured in California,³⁶ the policy reflected in Arizona law would not be advanced by its application in this case.³⁷ Thus, only California has an interest in applying its law.

The preliminary determination of the policies and interests of the involved states leads to a particular case's falling into one of four "interest situations": (1) the false conflict, (2) the apparent conflict, (3) the true conflict, and (4) the unprovided-for case. Each will be defined and discussed separately.

A. *The False Conflict*

When a consideration of the policies and interests of the involved states leads to the conclusion that one state has an interest in having its law applied on the point in issue while the other state does not, the false conflict is presented.³⁸ In such a situation Currie advocates application of the law of the only interested state.³⁹ The false conflict appears most frequently in accident cases such as *Grant v. McAuliffe*, where two parties from a recovery state are involved in an accident in a non-recovery state. In such cases, the policy of the recovery state will be advanced by the application of its law, while the non-recovery state generally will have no interest in applying its law. It is here that the place of the wrong rule of the traditional approach⁴⁰ produces a clearly unsound result, since it requires the application of the law of the state that has no interest in having its law applied to the detriment of the interest of the state that does.⁴¹ And it was in such a case⁴² that the revolution in choice of law began. This breakthrough has resulted in the widespread abandonment of the traditional approach in favor of "modern

36. For insurance purposes, the vehicle is considered insured in the state where it is garaged, and the insurer is considered a "resident" of this state for the purpose of determining a state's interest in protecting the insurer.

37. *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in CURRIE, *supra* note 1, at 145, 160 (article originally published at 10 STAN. L. REV. 205 (1958)).

38. The term, "false conflict," has been used by other writers to describe different situations, such as where the substantive laws of the involved states do not differ, or where, although they do, the same result would be reached under either law. See Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 75-78 (1967) [hereinafter cited as *False Conflicts*]. As now Professor Westen observed there, "To the extent that a finding of false conflicts is a product of governmental interest analysis, it is both improper and misleading to divorce that finding from the process which creates it." *Id.* at 79.

39. "If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state." CRAMTON, CURRIE & KAY, *supra* note 1, at 222.

40. See RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

41. See, e.g., *White v. King*, 244 Md. 348, 223 A.2d 763 (1966). To avoid such a result in *Grant v. McAuliffe*, the court resorted to manipulative techniques to bring about the application of California law. See Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959).

42. See note 14 *supra*.

solutions.⁴³ Most commentators and courts agree with Currie on resolution of the false conflict: It should be resolved by applying the law of the only interested state,⁴⁴ whether the interested state is the forum or another state.⁴⁵

B. *The Apparent Conflict*

When Currie looked to the interests of the involved states, his initial inquiry was directed to whether each state had a possible or hypothetical interest: Might the policy behind a state's law be advanced if it were applied on the point in issue? If each state had a possible interest, the case presented an apparent conflict. In such a situation Currie said that the court should reexamine the respective policies and interests of the involved states and ask whether a more moderate and restrained interpretation of the policy or interests of one of the states could avoid the conflict.⁴⁶ As he put it, "There is room for restraint and enlightenment in the determination of what state policy is and where state interests lie."⁴⁷ If the court concludes

43. In the guest statute situation, *see, e.g.*, *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966); *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917, *cert. denied*, 393 U.S. 957 (1968); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). In the situation involving other immunities, *see, e.g.*, *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *Brown v. Church of the Holy Name of Jesus*, 105 R.I. 322, 252 A.2d 176 (1969). For a listing of all of the states that have abandoned the traditional approach, *see Sedler, Rules of Choice of Law, supra* note 3, at —, n.2.

44. *See, e.g.*, D. CAVERS, *THE CHOICE OF LAW PROCESS* 30-32 (1965); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 201-03 (1971) (Professor Weintraub uses the term "spurious conflict"); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 4-8 (1963); Horowitz, *The Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 723, 729-47 (1974); Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 847-51 (1961); Von Mehren, Book Review, 17 J. LEGAL EDUC. 91, 92 (1964).

45. As to the application of the law of the only interested state by the "disinterested" forum, *see, e.g.*, *Williams v. Rawlings Truck Line*, 357 F.2d 581 (D.C. Cir. 1965); *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Fuller v. Greenup*, 267 Cal. App. 2d 10, 72 Cal. Rptr. 531 (2d Dist. 1968). *But see Schlitz v. Meyer*, 29 Ohio St. 2d 184, 280 N.E.2d 925 (1972), where in a suit between two Kentucky residents who were involved in an accident in Ohio, the Ohio court held that it was required to apply the legislative policy represented in the Ohio guest statute to any accident that occurred in that state. In accident cases, the practice of the courts is summarized by the following rule of choice of law: When two parties from a recovery state, without regard to forum residence, are involved in an accident in a non-recovery state, recovery will be allowed. *See Sedler, Rules of Choice of Law, supra* note 3, at —.

46. CRAMTON, CURRIE & KAY, *supra* note 1, at 222; *Notes on Methods and Objectives in the Conflict of Law*, in CURRIE, *supra* note 1, at 186 (article originally published at 1959 DUKE L.J. 171).

47. *The Silver Oar and All That: A Study of the Romero Case*, in CURRIE, *supra* note 1, at 368 (article originally published at 27 U. CHI. L. REV. 1 (1959)). He

that a more moderate and restrained interpretation of the policy or interest of one state can avoid the conflict, there is, in effect, a false conflict, calling for application of the law of the only state found to have an interest.

C. *The True Conflict*

Where a reconsideration of the policies and interests of the involved states persuades the court that the conflict cannot be avoided by a more moderate and restrained interpretation of the policy or interest of one state, the case presents the true conflict. Such was the situation in *Milliken v. Pratt*. Massachusetts' policy of protecting married women from overreaching on the part of their husbands was implicated, notwithstanding that the contract was entered into in Maine with a Maine creditor. Likewise, Maine's policy of promoting security of transactions was implicated, notwithstanding that the defendant was a resident of Massachusetts. In Currie's words, "Each state has a policy, expressed in its law, and each state has a legitimate interest, because of its relationship to one of the parties, in applying its law and policy to the determination of the case."⁴⁸

Currie emphasizes that the traditional approach (or for that matter, any rules approach), would resolve the conflict of interests by the application of a rule which would be based, in one degree or another, on the factual contacts the transaction had with the involved states. Apart from his view that factual contacts are simply not "rational" criteria to resolve a conflict of interests, Currie objects to any resolution of the true conflict in which the forum sacrifices its own policy and interest. Whether it does so by the application of a rule or by an "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail,"⁴⁹ a court performing the judicial function cannot, in Currie's view, prefer the interest of another state to its own.⁵⁰ Therefore, in the case of the true conflict,

uses the example of a consideration of the interests of foreign countries in determining the application of the Jones Act to cases involving foreign flag ships.

48. *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in CURRIE, *supra* note 1, at 107-08 (article originally published at 25 U. CHI. L. REV. 227 (1958)). The true conflict would also be presented in Currie's variation of *Grant v. McAuliffe*, where an Arizona tortfeasor injured a California plaintiff in California. *Id.* at 148-49. Whenever a recovery state plaintiff is injured by a non-recovery state defendant, a true conflict is necessarily presented. Both states are interested in applying their law on the recovery question, since the consequences of allowing or denying recovery will be felt in the parties' home states irrespective of where the accident occurred.

49. *Notes on Methods and Objectives in the Conflict of Law*, in CURRIE, *supra* note 1, at 182 (article originally published at 1959 DUKE L.J. 171).

50. This, says Currie, "is a political function of a very high order. This is a function that should not be committed to courts in a democracy." *Id.* at 182.

Currie maintains that the forum must advance its own policy and interest and apply its own law.⁵¹

Built into Currie's methodology, then, is the premise that the result may differ depending on where suit is brought, as it clearly will in the true conflict situation. Such differences are unavoidable, says Currie; if uniformity is to be achieved and the interest of one state is to be sacrificed in favor of another, it must be done by Congress in the exercise of its powers under the full faith and credit clause.⁵²

D. *The Unprovided-For Case*

Analysis of the policies and interests of the involved states may lead to the conclusion that neither state has an interest in having its law applied on the point in issue. Currie calls this situation the "unprovided-for case,"⁵³ unprovided-for because the analysis of the policies and interests of the involved states does not by itself lead to a solution. Such cases will arise because, as Currie notes, "[d]ifferent laws do not necessarily mean conflicting policies, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states."⁵⁴ He uses as an example of the unprovided-for case a *Grant v. McAuliffe* variation in which an Arizona plaintiff is injured in Arizona by a California defendant. California's policy is to protect accident victims, but it has no interest in applying this policy in favor of an Arizona plaintiff injured in Arizona by a California defendant. Arizona's policy is to protect the estates of deceased tortfeasors and their insurers; it has no interest in applying that policy in the case of a California tortfeasor. Thus neither state cares what happens, and it

51. *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in CURRIE, *supra* note 1, at 119-21 (article originally published at 25 U. CHI. L. REV. 227 (1958)).

52. *Id.* at 125-27, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in CURRIE, *supra* note 1, at 193-94 (article originally published at 26 U. CHI. L. REV. 9 (1958)). He notes that Congress has exercised its powers under the full faith and credit clause with respect to recognition of sister state judgments, which is why a state cannot assert a conflicting interest in opposition to recognition of such a judgment. *The Constitution and the "Transitory" Cause of Action*, in CURRIE, *supra* note 1, at 330-37 (article originally published at 73 HARV. L. REV. 36, 268 (1959)).

Currie also discusses the situation of a true conflict brought in a disinterested third state, e.g., *Milliken v. Pratt* brought in Vermont, and proposes means for its resolution. Currie, *The Disinterested Third State*, *supra* note 1, at 767, 778-80. See also CRAMTON, CURRIE & KAY, *supra* note 1, at 222. Since such cases are exceedingly rare in practice and are even less likely to occur as a result of the inroads made into "transient jurisdiction" by *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977), this interest situation will not be discussed in this Article.

53. *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in CURRIE, *supra* note 1, at 152 (article originally published at 10 STAN. L. REV. 205 (1958)).

54. *Id.* at 153.

is necessary to go beyond the policies and interests reflected in the differing laws to decide which law should be applied.

Currie did not fully develop solutions for the unprovided-for case.⁵⁵ Rather, he discussed it primarily in the context of unconstitutional discrimination, *i.e.*, whether it was unconstitutional for a state to refuse to extend the benefit of its law to a non-resident party.⁵⁶ Not only, however, is Currie's approach bereft of fully-developed solutions for this interest situation, but also, as will be shown, it is the unprovided-for case that has given the courts the most difficulty in practice.⁵⁷

II. CRITICISMS OF INTEREST ANALYSIS AS A BASIC APPROACH AND ALTERNATIVE APPROACHES TO CHOICE OF LAW

This section discusses and responds to the criticisms that have been directed against interest analysis as a basic approach to choice of law. It also discusses what may be called the other basic approaches to choice of law, specifically the approaches of territorialism and of narrow, policy-based rules.⁵⁸

55. He did, however, advance some tentative solutions. *Id.* at 153-56.

56. In the *Grant v. McAuliffe* variation, the constitutional question would be whether, since California would apply its law in favor of a California plaintiff injured by a California tortfeasor in Arizona, California would be discriminating unconstitutionally against an Arizona plaintiff in violation of the privileges and immunities clause, U.S. CONST. art. IV, § 2, and the equal protection clause, U.S. CONST. amend. XIV, if that plaintiff did not also receive the benefit of the California law allowing recovery. *See generally Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in CURRIE, *supra* note 1, at 445 (article originally published at 69 YALE L.J. 1323 (1960)); *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, in CURRIE, *supra* note 1, at 526 (article originally published at 28 U. CHI. L. REV. 1 (1960)). Currie thought such unconstitutional discrimination would exist because California has what Currie called an "altruistic interest" in applying its law to allow recovery, and did not have a subsidiary policy of protecting the estates of deceased tortfeasors. *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in CURRIE, *supra* note 1, at 489 (article originally published at 69 YALE L.J. 1323 (1960)); *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, in CURRIE, *supra* note 1, at 571-72 (article originally published at 28 U. CHI. L. REV. 1 (1960)). I, however, find it highly unlikely that the Supreme Court will be disposed to find limitations on choice of law inhering in the privileges and immunities and equal protection clauses. *See Sedler, Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 143-49 (1973) [hereinafter cited as Sedler, *Interstate Accidents*].

57. *See* note 384 & accompanying text *infra*.

58. I will not be discussing at length the approach of the *Restatement Second* in the present article. *See generally* Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 4, at 61-63; Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and Critique*, 72 COLUM. L. REV. 279, 284-86 (1972) [hereinafter cited as Sedler, *Contracts Provisions*]. Although the structure of the *Restatement Second* emphasizes localization based on factual contacts, the courts are also directed under § 6 to take into account various policy considerations, including the policies reflected in the substantive laws of the involved states, and the interest of each state, in light of those policies, in having its law applied on the point in issue. The amalgam of "localization and policy," which combines "rules" and "approach,"

A. *The Criticisms*

1. Lack of Governmental Interest in Private Litigation

The underlying premise of Currie's interest analysis has been called unsound on the ground that a state is interested only in the application of its public law—such as criminal, taxation, and social insurance law—which relates to the power of the state to control political matters, and not in the application of its private law, which does not implicate the power of the state.⁵⁹ Another commentator has noted that a conflicts case involving private litigants presents no "conflict between states in the sense in which states clash on questions of boundary, treatment of foreign nationals or property, or spheres of interest."⁶⁰ Thus, in a conflicts case, the court should be interested in achieving "conflicts justice"⁶¹ between the private parties and the private interests before it.⁶² Further, that states "desire" to have their law applied, and that the intent of the lawmaker was "to have [law] apply within the limits of existing or future choice of law rules," has been called a fictitious concept.⁶³

The response to this line of criticism begins with the observation that interest analysis is not intended to turn conflicts law into a "public law" matter. The focus of interest analysis is still on the private parties; it is only that their rights in a conflicts case are determined with reference to the policies and interests reflected in the differing laws of the involved states. When the policy behind a state's law would be advanced, the party who would benefit from the application of the law is deemed entitled to invoke such benefit in the choice of law context.

More significantly, while a conflicts case admittedly does not involve a direct conflict between states in the same manner as a boundary dispute or a dispute over spheres of interest, a state may still have a potential stake in the outcome of a controversy between private persons.⁶⁴ Particularly in regard to regulatory and protective

see Reese, *Rules or Approach*, note 9 *supra*, may have turned the *Restatement Second* into a "flabby, amorphous and sterile product." CRAMTON, CURRIE & KAY, *supra* note 1, at 307. Those courts that purport to apply the *Restatement Second* tend in practice to emphasize the policy aspect over the "rule" aspect, and generally decide the case with reference to the policies and interests of the involved states. See Sedler, *Contracts Provisions*, *supra* at 311-15.

No academic commentator appears to favor retention of the traditional approach, and no useful purpose would be served in rehashing its deficiencies in the present article.

59. Kegel, *supra* note 8, at 180-82.

60. Rheinstein, *supra* note 8, at 664.

61. *Conflicts justice* refers to achieving a just result in a case containing a foreign element by applying the law of a particular state. See, e.g., Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 208-10 (1969); Kegel, *supra* note 8, at 184-89.

62. Kegel, *supra* note 8, at 186.

63. Juenger, *supra* note 61, at 209.

64. See A. SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW* 64-66 (1970)

laws, which are aimed at social engineering,⁶⁵ the state may be relying on the private persons whose interests are affected by those laws to implement the social engineering policy.⁶⁶ In this country, for example, tort law rather than social insurance still represents the primary method of providing compensation for accident victims.⁶⁷ Thus, a state is interested in having its tort law applied to implement the compensatory policy reflected in that law in the same manner as it would be interested in applying its social insurance law.⁶⁸ As this example indicates, it is not possible to draw a neat distinction between "public law" and "private law." Rules of substantive law are frequently interlocking: Public law has private law elements and vice versa, so that the public law and private law elements of a rule of substantive law cannot always be separated.⁶⁹ In short, public law interests are present in a host of questions litigated by private parties,⁷⁰ and it is simply inaccurate to say that the state as such has no interest in the outcome of litigation between private parties.⁷¹

2. No Consideration of Policies Other Than Those Expressed in Substantive Law Rules

Although this criticism is to some extent directed specifically

[hereinafter cited as SHAPIRA]. For example, the impact that the application of American maritime or labor law to disputes between seamen and foreign flag ships could have on the "governmental interests" of the maritime nations was demonstrated by their filing of amicus briefs when cases involving these questions were before the Supreme Court. See Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 147-49 (1967).

65. See SHAPIRA, *supra* note 64, at 72-73.

66. As to the vindication of public interests by private litigants in a different context, see *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

67. This has not been altered by the enactment of no-fault automobile insurance laws in many states because of the generally low threshold limits contained in those laws.

68. The "social engineering" function is the same irrespective of how the state goes about achieving it.

69. See generally Riphagen, *The Relationship between Public and Private Law and the Rules of Conflict of Laws*, 102 RECUEIL DES COURS 215, 220-21 (1961).

70. See *id.* at 229-39.

71. As for the argument that the responsibility of a court in a conflicts case is to achieve "conflicts justice," Currie notes that the ideal of justice under law in the conflicts situation necessarily involves an ambiguity—justice under what law? *Survival of Actions: Adjudication Versus Automation in Conflict of Laws*, in CURRIE, *supra* note 1, at 138 (article originally published at 10 STAN. L. REV. 205 (1958)). The judicial responsibility is to find a rational and just result in the case before it. *The Verdict of Quiescent Years*, in CURRIE, *supra* note 1, at 596 (article originally published at 28 U. CHI. L. REV. 258 (1961)). And as Professor Shapira has noted, it is contrary to the nature and purpose of the judicial process for the court to apply or reject rules of law in ignorance of their underlying public interests. SHAPIRA, *supra* note 64, at 65. If interest analysis does produce "rational and just results" in the cases that come before the courts, it must be deemed to satisfy the concern for "conflicts justice."

against Currie's proposed resolution of the true conflict,⁷² it really calls into question the basic premise of interest analysis: that the choice of law decision should be made on the basis of substantive laws of the involved states. The contention of this line of criticism is that in the conflicts case significant consideration should be given to *multistate* concerns which transcend the policy reflected in a state's substantive law. The criticism⁷³ is best summarized by Professor Rosenberg's observation that a conflicts case necessitates "coordinating a multistate system, not merely vindicating substantive law policies."⁷⁴

Currie has in effect responded to this criticism as follows:

I have been told that I give insufficient recognition to governmental policies other than those that are expressed in specific statutes and rules; the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on. If this is so, it is not, I hope, because of a provincial lack of appreciation of the worth of these ideals, but because of a felt necessity to emphasize the obstacles that the present system⁷⁵ interposes to any intelligent approach of the problem. Let us first clear away the apparatus that creates false problems and obscures the nature of the real ones. Only then can we effectively set about ameliorating the ills that arise from a diversity of laws by bringing to bear all the resources of jurisprudence, politics, and humanism—each in its appropriate way.⁷⁶

Under Currie's approach, considerations of policies other than those reflected in the substantive laws of the involved states do come into play to the extent that they are related to "restraint and enlightenment in the determination of what state policy is and where state interests lie."⁷⁷ While these considerations are not emphasized by Currie, neither are they ignored. Currie cautioned that a court would be "well advised to consider the conflict with foreign interests that may result from a too selfish and provincial determination,"⁷⁸ and noted that "the courts of a state may properly take into

72. The criticism is expressed by some commentators who, while favoring interest analysis generally, disagree with Currie's resolution of the true conflict. See generally SHAPIRA, note 69 *supra*; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975) [hereinafter cited as von Mehren, *Recent Trends*].

73. Different commentators have formulated these multi-state concerns differently. See SHAPIRA, *supra* note 69, at 112; Hill, *supra* note 8, at 489; Kegel, *supra* note 8, at 180-82; von Mehren, *Recent Trends*, *supra* note 72, at 942 (1975).

74. Rosenberg, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 459, 464 (1967).

75. As pointed out previously, Currie was writing against the background of the traditional approach.

76. *Notes on Methods and Objectives in the Conflict of Laws*, in CURRIE, *supra* note 1, at 186-87 (article originally published at 1959 DUKE L.J. 171).

77. *Id.* at 186.

78. *The Verdict of Quiescent Years*, in CURRIE, *supra* note 1, at 592 (article originally published at 28 U. CHI. L. REV. 258 (1961)).

account the possibility of conflict with the interests of other states in determining what domestic policy is and how far domestic interests extend."⁷⁹ It is this "restraint and enlightenment" on which Currie relied to give what he considered to be appropriate recognition to multistate concerns.

What Currie was not willing to do, however, was sacrifice the advancement of the forum's interest for the sake of multistate concerns.⁸⁰ His sense of priorities appears most clearly in his insistence that the forum must apply its own law in the case of the true conflict, in the face of a situation in which the criticisms of those who oppose interest analysis as a basic approach and those who only oppose Currie's resolution of the true conflict blend. The matter of consideration of policies other than those expressed in substantive law rules, therefore, will be discussed more fully in the context of criticism of Currie's solution to the true conflict.⁸¹ The point to be emphasized at this juncture is that Currie did not completely ignore multistate concerns, but subordinated them to a consideration of the policies and interests reflected in the substantive laws of the involved states.⁸²

3. The Difficulty in Determining Policies and Interests

a. *Difficulty in Determining Policy.* Probably the major criticism that has been directed against interest analysis is the purported difficulty in determining the policies behind particular laws and the interest of a state in having its law applied to implement those policies. If the critics are to be believed, this difficulty may be compared with cleaning out the Augean stables or any of the other labors of Hercules. Professor Reese claims that to determine the policy behind a law "will often prove an onerous, difficult, and frustrating task," and that even when this can be done, "it will often be difficult to refine the policy to the point of being able to determine whether it would or would not be furthered by the [substantive] rule's application in a case involving foreign facts."⁸³

79. *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in CURRIE, *supra* note 1, at 498 (article originally published at 69 YALE L.J. 1323 (1960)).

80. Including, of course, supposed uniformity of result. *Married Women's Contracts: A Study in Conflicts-of-Law Method*, in CURRIE, *supra* note 1, at 119 (article originally published at 25 U. CHI. L. REV. 227 (1958)).

81. See notes 220-24 & accompanying text *infra*.

82. It has also been contended that Currie failed to take account of considerations of fairness to the parties. Hill, *supra* note 8, at 474. Fairness to the parties, however, is an independent choice of law consideration, see notes 233-34 & accompanying text *infra*, and is built into Currie's governmental interest approach in the same manner as it is built into any other approach to choice of law. Currie was indeed concerned with fairness, especially in regard to consensual transactions, where the parties may have relied on the law of a particular state. See Currie, *Full Faith and Credit*, *supra* note 1, at 97-99.

83. Reese, *Rules or Approach*, *supra* note 9, at 317.

He notes that the New York Court of Appeals had been employing interest analysis,⁸⁴ and that, "because of the uncertainty and unpredictability it engendered, the court has been deluged by appeals and wracked by dissent."⁸⁵ There is said to be particular difficulty in ascertaining the policy behind the law of another state⁸⁶ even when it is possible to ascertain the policy behind the law of the forum.⁸⁷ Finally, says Professor Reese, interest analysis requires that every case be decided on an ad hoc basis,⁸⁸ thus affording the courts opportunities for "judicial masquerading." As he puts it:

Since there will often be uncertainty as to what policy or policies are embodied in a statute or judge-made rule, it is all too easy for a court to decide first on the rule that it wishes to apply and then to ascribe to that rule a purpose that makes its application appropriate while ascribing at the same time to the potentially applicable rules of other states purposes that would not be furthered by their application.⁸⁹

The best answer to this line of criticism lies in the experience of the courts in practice, which demonstrates most clearly that it is not difficult to determine either the policies behind a particular rule of substantive law or the interest of each of the involved states in having its law applied on the point at issue. The argument is indeed undercut completely by the fact that in the non-conflicts situation the court must frequently identify the policy behind a law in order to determine whether that policy would be advanced by the law's application to the facts of a particular case. As Currie points out, the process is identical in the conflicts and non-conflicts situation: The court must decide whether the policy behind a particular rule of law would be advanced by its application in the particular circumstances presented.⁹⁰

This point may be illustrated by comparing the court's treatment of *Bernkrant v. Fowler*,⁹¹ with the treatment that case would have received had it been purely domestic. In *Bernkrant*, a promise was made by the decedent for debt forgiveness by will as part of a

84. It seemingly abandoned that approach, at least in part, in favor of narrow, policy-based rules in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). See Sedler, *Interstate Accidents*, *supra* note 56, at 125-37.

85. Reese, *Rules or Approach*, *supra* note 9, at 318.

86. von Mehren, *Recent Trends*, *supra* note 72, at 942.

87. As to the difficulty in determining policies and interests, see also the discussions in Rheinstein, *supra* note 8, at 663; Rosenberg, *supra* note 79, at 464.

88. Reese, *Chief Judge Fuld*, *supra* note 9, at 559. He also maintains that each decision would have little or no precedential effect, because "[i]t is entirely possible for two identically worded statutes to have been enacted for different purposes." *Id.*

89. *Id.* at 559-60.

90. *Notes on Methods and Objectives in the Conflict of Laws*, in CURRIE, *supra* note 1, at 183-84 (article originally published at 1959 DUKE L.J. 171).

91. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

land financing transaction. The decedent was presumed to be domiciled in California at the time the promise was made, while the claimants were domiciled in Nevada, where the land was situated. The decedent's will did not contain the promised debt forgiveness provision, and the claimants brought suit in California to enforce the contract. The purported contract to will was enforceable under Nevada law, but the decedent's representative claimed it violated the California statute of frauds pertaining to wills. The California court applied Nevada law and rejected the defense.⁹²

It is my submission that the court reached this result because it treated the case as involving a commercial contract rather than a true contract to will.⁹³ The decedent was not trying to pass a portion of the estate by his will, but to the contrary, in the words of the lower court, was engaged in a "sporting proposition,"⁹⁴ and hoped that he would live long enough to avoid forgiving any of the debt. Since what was involved was not a true contract to will, the policy behind the California statute of frauds pertaining to wills would not be advanced by that statute's application to a commercial contract.⁹⁵ Had the same court been confronted with a true contract to will, it would very likely have held that California law, the law of the decedent's domicile, applied.⁹⁶

If *Bernkrant* had been a purely domestic case, where all parties were residents of California and the land was situated there, the California court would have had to make the same determination: whether the California statute of frauds pertaining to wills was applicable to this "sporting proposition." It is difficult to see how the California court would have had more difficulty in determining the policy behind California's statute of frauds pertaining to wills in *Bernkrant* than it would have had in the purely domestic case posited above, and in such a case it likely would have held that the statute of frauds did not apply. Since a court must regularly

92. In speaking of that case, Currie says: "The restraint and moderation with which domestic interests are defined raise a standard to which the wise and honest can repair, and should be a reproach to those who feel that the method of governmental-interest analysis must necessarily produce egocentric or provincial results." *Justice Traynor and the Conflict of Laws*, in CURRIE, *supra* note 1, at 688-89 n.236 (article originally published at 13 STAN. L. REV. 719 (1969)). See also Currie, *The Disinterested Third State*, *supra* note 1, at 761-63.

93. See Sedler, *Characterization, Identification of the Problem Area and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8, 89-95 (1970) [hereinafter cited as Sedler, *Characterization*].

94. *Id.* at 89-90.

95. A true contract to will was involved in *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895). The decedent's domicile, using the traditional approach, applied its own law to invalidate the contract.

96. Sedler, *Characterization*, *supra* note 93, at 94.

determine the policy behind its own laws in deciding on their application in domestic cases, no reason appears why it cannot make the same determination of policy in cases containing a foreign element.⁹⁷

One reason that the critics of interest analysis have seen such difficulty in determining the policies behind the laws of the involved states is their failure to distinguish between legislative purpose and legislative motivation. Legislative purpose refers to the objectives a law is designed to accomplish, while legislative motivation may be defined as factors stimulating enactment of a law. For example, if the legislature imposes a limit on the amount recoverable for wrongful death, its purpose obviously is to limit damages awards in such cases, and the policy reflected in such a law is to protect defendants and insurers from what the legislature considers to be excessive liability. Motivation, however, may vary from one legislator to the next. Some may have feared excessive verdicts in wrongful death cases and believed that such verdicts would be unjust. Others may have been concerned about rising insurance premiums. Others simply may have responded to the pressures of the insurance lobby.⁹⁸

In determining, both in the conflicts and non-conflicts situation, the policy behind a rule of substantive law, what is relevant is legislative purpose, not legislative motivation.⁹⁹ That purpose can be determined from the provisions of the law itself, viewed functionally and in relation to other laws of the state dealing with the same subject. As the example above indicates, a collective motivation cannot be ascribed to the legislature,¹⁰⁰ but a collective purpose can. That purpose must be found in the provisions of the law that the legislature has enacted. It is this collective purpose that determines the policy behind a rule of substantive law under interest analysis.¹⁰¹

97. So too, in determining the policy behind the law of another state, the court puts itself in the position of the courts of that state when called upon to decide the law's application in a domestic case and "imputes those policies to a foreign law which it could conceive a rational foreign court adopting, were that foreign court deciding the case at hand." *False Conflicts*, *supra* note 38, at 85.

98. For a discussion of legislative motivation in the constitutional context by the Supreme Court, see *United States v. O'Brien*, 391 U.S. 367, 382-84 (1968).

99. See notes 28-34 & accompanying text *supra* in regard to the determination of legislative policy in *Grant v. McAuliffe*.

100. As Professor Ratner has noted, identification of the policies behind a rule of substantive law

focuses not on the motives or intentions of the legislators who enacted the statute or of the judges who developed the common law rule but on community purposes or goals as disclosed by the problems that evoked the rule, its function in the network of existing community arrangements, and the beneficial consequences to the community of its implementation.

Ratner, *Choice of Law: Interest Analysis and Cost Contribution*, 47 S. CAL. L. REV. 817, 819 (1974).

101. While "purpose" and "policy" are sometimes used interchangeably in a discussion of interest analysis, we will use only "policy," noting that "policy" is used to describe the collective legislative purpose.

In trying to identify the policy behind a rule of substantive law, then, the court must ask what the rule was designed to accomplish and what in fact it will accomplish if applied to the kind of case that is now before it.¹⁰² Currie emphasized that the court must look for the rational and legitimate policy behind the rule in question,¹⁰³ and for those "asserted policies and principles which are genuinely held and adequately supported by available evidence."¹⁰⁴ The court should also look to the contemporary policy that a law serves, totally apart from the policy that it may have served at an earlier time.¹⁰⁵ The point to be emphasized is that the policies behind a rule of substantive law are to be determined functionally with reference to the law's provisions and in relation to other laws of the state dealing with the same subject.

This process is illustrated in a different context by the Supreme Court's analysis of the asserted purposes of state laws or other governmental action when their constitutionality is in issue. For example, in *Eisenstadt v. Baird*,¹⁰⁶ the Court considered the constitutionality of a law prohibiting the distribution of contraceptives except to married persons for whom contraceptives were prescribed by a physician. The state first tried to justify the measure on the ground that it was designated to discourage non-marital sexual relationships. Fornication, however, was a misdemeanor entailing, at most, a three month sentence, while violation of the anticontraceptive statute was a felony punishable by five years imprisonment. This being so, it was patently unreasonable to believe that the state had chosen to implement its prohibition against fornication by subjecting the distributor of contraceptives to twenty times the punishment imposed against a fornicator.¹⁰⁷ Then the state argued that the statute was a health measure. The Court rejected this

102. This has elsewhere been referred to as the "mischief approach." D. ST. L. KELLY, *LOCALIZING RULES IN THE CONFLICT OF LAWS* 84-85 (1974). Currie also notes that determination of policy and interest is a matter for the courts, and that all that "conflict of laws technicians" can do is to "postulate state policies and interests." *The Verdict of Quiescent Years*, in CURRIE, *supra* note 1, at 591-92 (article originally published at 28 U. CHI. L. REV. 258 (1961)).

103. See notes 31-34 & accompanying text *supra*.

104. SHAPIRA, *supra* note 64, at 147. As to the problems that may arise where the legislature has failed to express the policy with sufficient clarity, see the discussion in CURRIE, *supra* note 1, at 344-50.

105. See Ehrenzweig, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 570, 580-83 (1968). Professor Ehrenzweig was making this point with respect to the forum's determination of the policy reflected in its own law in order to decide on its scope of application. See also SHAPIRA, *supra* note 69, at 145. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court noted that while the justification for anti-abortion laws when first enacted may have been to protect pregnant women from a hazardous medical procedure, the retention of those laws by the states after the medical danger had been removed could serve a different purpose, namely the protection of potential human life, and approached the constitutionality of those laws with reference to this "contemporary" purpose. *Id.* at 147-52.

106. 405 U.S. 438 (1972).

107. *Id.* at 449-50.

argument on the grounds that not all contraceptives were dangerous, and a physician competent to prescribe contraceptives for married persons was also competent to prescribe contraceptives for unmarried persons. Thus, looking to the content of the law and its relation to other laws, the Court concluded that it could not serve the rational and legitimate purpose either of deterring fornication or protecting public health.¹⁰⁸

The same kind of approach was taken in the choice of law context by the New York Court of Appeals in *Tooker v. Lopez*,¹⁰⁹ where the court held that a "rational" policy behind the Michigan guest statute could not have been to give priority in the assets of the driver to a non-negligent third party over the guest passenger.¹¹⁰ The *content* of the guest statute did not support such a purpose. If the purpose had been to give priority to the non-negligent third party, the statute would have barred suit by the guest passenger entirely.¹¹¹ Instead, it allowed suit by the guest passenger against the host driver whenever gross negligence could be shown. The court concluded, "The only justification for discrimination between injured guests which can withstand logical as well as constitutional scrutiny . . . is that the legitimate purpose of the statute—prevention of fraudulent claims against local insurers or the protection of local automobile owners—is furthered by increasing the guest's burden of proof."¹¹² As these examples should indicate most clearly, there is ordinarily no real difficulty in determining the policies behind a state's law when those policies are determined functionally with reference to the content of the law and in relation to other laws of the state dealing with the same subject.

The other reason why the critics have seen such difficulty is that they have been trying to identify a single or primary policy behind the law in question. For purposes of interest analysis, a rule of substantive law should be presumed to reflect *all* legitimate policies that it could possibly serve. Experience indicates that when multiple policies are assumed they will usually support the same

108. *Id.* at 452. See also *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), where the Court concluded that the purpose of providing a "mother's benefit" for the widow of a deceased worker covered by Social Security, who died leaving a child, was to enable the mother to stay at home with the child, and that with this as the purpose, there was no rational basis for denying a "father's benefit" to the widow of a deceased worker. As to the Supreme Court's present scrutiny of asserted governmental purposes in constitutional cases, see generally Gunther. *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

109. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

110. The court had earlier ascribed such a purpose to a similar Colorado statute in *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). See *Sedler, Babcock v. Jackson in Kentucky*, *supra* note 4, at 74-77 (discussion of *Dym*).

111. 24 N.Y.2d at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524.

112. *Id.*

conclusion as to which state is interested in applying its law in order to implement those policies. That is, it is rare for one policy to indicate a state's interest in applying its law while another policy points to a lack of interest. For example, assume the policy behind a guest statute is found to be threefold:¹¹³ (1) to protect hosts from suits by ungrateful guests, (2) to protect insurers from collusive suits,¹¹⁴ and (3) to exclude guest-passenger cases from the insurer's liability, thereby possibly lowering insurance rates or increasing insurance companies' profits. The only state interested in applying a guest statute to implement any or all of these policies is the defendant's home state,¹¹⁵ where the vehicle is insured, and where the consequences of imposing liability, including the charging of the accident for the purposes of the insurer's loss experience, will be felt.¹¹⁶ Thus, there is no utility whatsoever in engaging in debate over the primary policy behind a guest statute because when multiple policies are assumed, the matter of policy and the matter of interests merge.

The identification of the policy behind one state's rule of substantive law may also serve to identify the policy of the state having the opposite rule of law. The state that does not have a guest statute, for example, has a policy of allowing compensation to all persons injured by the ordinary negligence of another, including guest passengers injured by the negligence of host drivers. And the state that does not have a statute of frauds has a policy of enforcing oral contracts, even at the price of having to determine more disputed claims than if it required agreements to be expressed with greater formality. In other words, once the court has determined the

113. As to the possibility of multiple purposes behind a guest statute, see Reese, *Chief Judge Fuld, supra* note 9, at 558-59.

114. Although in a sense, these two purposes seem logically inconsistent, it is not unreasonable to ascribe both purposes to the legislature, *i.e.*, in cases where there was a prior relationship between the parties, collusion is likely to occur, while in cases where there was not, the host should be protected against suit by the "ungrateful guest."

115. In *Tooker*, the court assumed that the Michigan guest statute reflected multiple policies. So too, a law providing for family immunity may be assumed to reflect both a policy of protecting family harmony and a seemingly inconsistent policy of protecting insurers from collusive suits by family members. In either event, the only state interested in applying its law to allow the defense is the state of the family domicile, which is also the state where the automobile is insured. See Sedler, *Characterization, supra* note 93, at 52-54. Likewise some laws reflect both an admonitory and a compensatory policy, *e.g.*, a dram shop act, and both policies should be presumed for purposes of interest analysis.

116. It is very unlikely that the existence of a guest statute as such will have any appreciable effect on insurance rates. See the "classic" discussion of this point in Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 574-77 (1961). In any event, since insurance rates are based on loss experience in a territory of insureds, *id.* at 567-69, the accident will be charged to the loss experience of drivers in the defendant's home state irrespective of where it occurs, and recovery will affect the profits of the insurer's business in that state.

policy behind one of the conflicting laws, it is very likely to have determined the policy behind the other law as well.¹¹⁷

b. *Difficulty in Determining Interest.* Even less difficult than defining the policy behind a rule of substantive law is determining a state's interest in applying that rule of substantive law in order to implement the policy reflected therein; identification of a law's policy or policies will usually make it clear whether each state is interested in applying its law on the point in issue. Just as a court in a domestic case must decide whether a statute should be applicable to a situation not clearly within its terms, in a conflicts case a court must decide whether the application of a statute or common law rule in the circumstances presented effectuates the legislative purpose.¹¹⁸ As Professor Kramer has put it, the question of whether a state's rule of law should be applied in a conflicts case depends on "whether the reasons or governmental interests behind the state's policy are such that the state has a logical, rational, legitimate cause to apply its policy to the case in question, in spite of the foreign elements involved in the case, because the local elements of the case—the parties, the subject matter, the transactions, the accident, the injury—bear a rational relationship to the reasons and interest behind the policy of the state."¹¹⁹

Professor Westen has formulated four general categories of

117. This is not to say that there never may be any difficulty in determining whether a particular policy should be ascribed to a particular rule of substantive law. For example, a rule making contributory negligence a complete bar to tort recovery, while clearly reflecting a policy respecting loss allocation resulting from accidents, could also be said to represent an admonitory policy, *i.e.*, it is designed to encourage a higher standard of conduct by completely barring recovery to a party who is even slightly at fault. While this does not seem to be a very realistic policy, it is not clearly irrational to ascribe such a policy to this rule. In practice, however, such situations will be fairly rare. Here, for example, the need to determine whether a rule of contributory negligence involves both policies will arise only when the forum is a contributory negligence state and the parties are from a comparative negligence state. This situation is unlikely to arise, since the plaintiff almost certainly will bring suit in the home state, which will apply its comparative negligence rule. See *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968).

118. To quote Professor Hancock: "Generally speaking, the court's basic task in a choice-of-law case is analogous to that in a wholly domestic case; it must decide whether or not an unforeseen set of facts comes within the policy range of a statutory or non-statutory domestic rule." Hancock, *Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited*, 18 U. TORONTO L.J. 331, 340 (1968). See also SHAPIRA, *supra* note 64, at 120; Ratner, *supra* note 100, at 819; *False Conflicts*, *supra* note 38, at 80.

119. Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 RUTGERS L. REV. 523, 532 (1959). Professor Seidelson has stated the test in terms of the relationship between the law in question and the litigants involved. "In determining whether a potentially interested state has a substantial interest in the issue presented, the forum should [ask if] one of the litigants is within the specific class of persons intended to be directly affected by that state's dispositive law, either beneficially or adversely." Seidelson, *Interest Analysis: For Those Who Like It and Those Who Don't*, 11 DUQ. L. REV. 283, 304 (1973).

interest.¹²⁰ A state is interested, he says, in applying its law to a particular case (1) when one of the persons it presumes to protect is a party to the dispute, (2) when conduct it finds culpable transpired within the state, (3) when its courts are invoked to resolve a dispute which it wishes to avoid, or (4) when persons with a financial stake in litigation are residents of the state.

The first category of interest generally refers to the forum's application of its protective policy on behalf of its residents, who are the "logical beneficiaries" of such protection. For example, when the forum's law allows recovery in an accident situation, it has chosen to protect accident victims. Clearly it is interested in applying that policy for the benefit of its resident accident victims, irrespective of where the accident occurs, since the social and economic consequences of the accident will be felt in the state of the victim's residence.¹²¹ So too, when a state immunizes, for instance, the host driver and insurer in the guest statute situation,¹²² it is interested in applying its policy whenever such an immune party is a resident of the state. This interest arises, again, because the consequences of denying immunity and, correlatively, of imposing liability will be felt in that state. Generally then, any rule that precludes or limits liability has the effect of protecting defendants as a class, and the defendant's home state ordinarily is interested in applying its protective policy in favor of its resident defendants.¹²³

The second category of interest is self-explanatory: the state whose law reflects an admonitory policy is always interested in applying its law to implement that policy whenever the conduct in question occurs within the state. This interest arises totally apart from any compensatory interest the state may also have.¹²⁴ A similar interest exists on the part of the state whose law reflects an admonitory policy whenever the conduct it finds culpable created a foreseeable risk of harm and, in fact, caused harm there, although the conduct took place in another state.¹²⁵

The third category of interest refers to the forum's application of its procedural rule which limits or disallows the bringing of suits of the type before the court. This category should be expanded to

120. *False Conflicts*, *supra* note 38, at 80-81.

121. *See, e.g.*, *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972).

122. *See, e.g.*, *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968).

123. *See, e.g.*, *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 325 A.2d 778 (1974). *See also* *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 317-18, 546 P.2d 719, 721-22, 128 Cal. Rptr. 215, 217-18, *cert. denied*, 429 U.S. 859 (1976).

124. *See, e.g.*, *Gaither v. Myers*, 404 F.2d 216 (D.C. Cir. 1968); *Williams v. Rawlings Truck Line*, 357 F.2d 581 (D.C. Cir. 1965); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957).

125. *See* *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976).

make it clear that the forum *qua* forum always has an interest, for reasons of judicial efficiency and conservation of court resources, in applying its laws that reflect a strong procedural policy to all litigation being conducted in its courts.¹²⁶

The fourth category, any interest arising from a resident's financial stake, may have been formulated too broadly if it is taken to mean that the forum can apply its law solely on the basis of the residency of one of the parties in the forum. In a contract case, for instance, the legitimacy of a state's applying its own law solely on the ground that the party who stands to gain or lose is a forum resident is dependent on the nature of the contract of the issue in question.¹²⁷ At the same time, however, the fact of residency may give a state a legitimate interest in allowing recovery on certain kinds of claims, such as life insurance contracts involving forum residents,¹²⁸ or in extending its "anti-contractual" protective policy to forum residents who have entered into contracts elsewhere.¹²⁹

These general categories of interest furnish a useful guide to the determination of when a state is interested in applying its law in order to implement the policies it reflects. In practice it is simply not difficult to identify the policies reflected in the laws of the involved states, and the interest of each state, in light of these policies, in having its law applied on the point in issue.

Critics have suggested,¹³⁰ however, and it cannot be denied that where a court wants to apply its own law, it may "manufacture" policies and interests.¹³¹ But a court that wants to apply its own law for whatever reason can always manipulate the approach it

126. For a discussion of the forum's procedural policy and how this relates to the extent to which it will use foreign law as a model in a case in which it is otherwise "disinterested," see Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813, 823-825 (1962). The state's interest in implementing its procedural policy stands on the same "constitutional footing" as its interest in implementing its substantive policy. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

127. The forum would not have a legitimate interest in applying its own law, for example, where a forum resident asserts the forum's statute of frauds defense in a claim involving a contract connected entirely with another state. See Sedler, *Characterization*, *supra* note 93, at 83-84.

128. See, e.g., *Zogg v. Penn Mut. Life Ins. Co.*, 276 F.2d 861 (2d Cir. 1960); Sedler, *Contracts Provisions*, *supra* note 58 at 312.

129. See, e.g., *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964); *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wash. 2d 806, 459 P.2d 32 (1969). See also the discussion in Sedler, *Contracts Provisions*, *supra* note 58, at 306-07, 311-12.

130. See notes 88-89 & accompanying text *supra*.

131. See, e.g., *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968), where the court claimed that its rule allowing recovery for ordinary negligence reflected an admonitory policy, so as to give Wisconsin an interest in applying its law to allow recovery when the accident occurred in Wisconsin although both parties resided in a guest statute state. This reasoning, although not the result, was subsequently repudiated by the court. *Hunker v. Royal Indem. Co.*, 57 Wis. 2d 588, 603-04, 204 N.W.2d 897, 905-06 (1973).

is purportedly following. This practice was widespread when all courts were following the territorially-based rules of the traditional approach,¹³² and is equally evident under other "modern" approaches to choice of law.¹³³ When a court "manipulates" an approach, the fault is that of the court, not of the approach. Interest analysis is no more subject to "manipulation" than any other approach to choice of law. To the contrary, interest analysis, which calls for a straightforward determination of the policies and interests of the involved states, and in Currie's view, for the application of the forum's law in the case of the true conflict, probably furnishes less motivation than other approaches for judicial manipulation.

B. *The Alternatives*

The two major modern alternatives to interest analysis as a basic approach to choice of law are (1) territorialism and (2) narrow, policy-based rules.¹³⁴

1. Territorialism

The essence of territorialism, or the "new and enlightened territorialism," as it has been called,¹³⁵ is that choice of law decisions should be made with reference to the place where legally significant events occurred rather than with reference to the policies and interests reflected in the laws of the involved states. The approach owes its origin to Professor Cavers' territorially-based principles of preference, which he originally formulated as solutions to the true conflict,¹³⁶ but which he subsequently indicated may have broader application.¹³⁷ Cavers' new territorialism was developed by Professor Twerski, into a full-blown alternative to what he

132. See Sedler, *Babcock v. Johnson in Kentucky*, *supra* note 4, at 48-53 (discussion of the use of manipulative techniques).

133. Courts that are purporting to apply the *Restatement Second's* most significant relationship approach, for example, usually find that their state is the state of the most significant relationship on the point in issue. See, e.g., *Haines v. Mid-Century Life Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

134. As to the approach of the *Restatement Second*, see note 58 *supra*.

135. As opposed to the "old territorialism" that formed the basis of the traditional approach. See Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971) [hereinafter cited as Twerski, *Enlightened Territorialism*].

136. See generally D. CAVERS, *THE CHOICE OF LAW PROCESS*, ch. 5 (1965) [hereinafter cited as CAVERS]. Cavers refers to the "hard cases, those cases in which legislative purposes are unclear or conflicting, cases which cannot be disposed of as posing either false conflicts or situations in which the claims of one state's law to application are plainly preponderant." *Id.* at 122.

137. Principally in regard to determining "whether and how a legislature has spoken on a question of choice and whether the conflict is false or may readily be avoided." Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS 75, 153 (1970).

calls "pure" interest analysis.¹³⁸ While not eliminating consideration of the policy behind a law and the interest of a state in applying its law,¹³⁹ Twerski scathingly attacks the single factor approach that he sees embodied in interest analysis. He insists that looking only to the policies and interests reflected in the substantive laws of the involved states introduces a "new rigidity" on the choice of law scene.¹⁴⁰

Twerski finds interest analysis objectionable because it fails to take account of the "time and space dimensions"¹⁴¹ which are at the heart of his territorialism. For example, he faults the New York court's use of interest analysis in *Tooker v. Lopez*.¹⁴² In that case, involving New York parties who were attending school in Michigan and who were on a trip from one point in Michigan to another when the accident occurred, the New York court applied its own law on the issue of guest statute immunity. To Twerski, the court erred in ignoring the fact that the accident was connected entirely with Michigan. He says that the result enables a party "to travel in the United States with the tough tort-law of his home state on his back."¹⁴³ More generally, he criticizes interest analysis for what he sees to be its orientation toward the law of the place where people live rather than toward the law of the place where things happened.¹⁴⁴ He also insists that the presumptive applicability of the forum's own law, which is a part of Currie's interest analysis,¹⁴⁵ causes the courts to avoid the task of "sensitively balancing" the interests involved.¹⁴⁶ As he concludes, "Interest analysis as presently expounded is a simplistic tool which stands in the way of sensitive judicial evaluation of complex issues of fact and law."¹⁴⁷

As an alternative Twerski proposes "enlightened territorialism." While conceding that a state's governmental interest should

138. According to Professor Twerski, "pure" interest analysis "looks solely to the state policies that underlie a particular law," while territorialism emphasizes the "geographical and temporal contacts of the controversy with the jurisdiction whose law is to be applied." Twerski, Book Review, 61 CORNELL L. REV. 1045, 1046 n.12 (1976) [hereinafter cited as Twerski, Book Review].

139. And thus, Twerski refers to himself as a part of the "interest analysis camp." *Id.* at 1046.

140. See Twerski, *To Where Does One Attach the Horses*, 61 KY. L.J. 393, 399-400, 407-10 (1972) [hereinafter cited as Twerski, *Attach the Horses*].

141. "Time and space dimensions" refer to the place or places where the parties were acting when legally significant events occurred. Twerski, *Enlightened Territorialism*, *supra* note 135, at 390.

142. 24 N.Y.2d 569, 209 N.E.2d 792, 301 N.Y.S.2d 519 (1965).

143. Twerski, *Enlightened Territorialism*, *supra* note 135 at 380-81.

144. See the discussion in Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 108-10 (1973) [hereinafter cited as Twerski, *Emperor's Clothes*].

145. See note 16 *supra*.

146. Twerski, *Attach the Horses*, *supra* note 140, at 405.

147. *Id.* at 412.

be taken into account, he clearly subordinates that factor to time and space dimensions: Where "[t]he fact pattern is so heavily dominated by one state that our sense of justice says that it is fair for the state's law to govern, another state's governmental interest may have to take a back seat to territorialism."¹⁴⁸ Despite Twerski's claim that he is seeking a "fundamental reconciliation of territorialist and interest analysis thinking,"¹⁴⁹ it is interest analysis that always takes the back seat: It is relevant only when there is a substantial coincidence between a state's interest in applying its law and the state's time and space connection with the transaction in question. It is Twerski's submission that in practice "juridical events tend to be rather heavily centered in one jurisdiction or another,"¹⁵⁰ and that, "[w]here the center of a juridical event is clearly defined in one jurisdiction then the law of that state ought generally to govern."¹⁵¹

Twerski relates time and space dimensions to expectations, foreseeability and comprehensibility. His theory is that the courts should apply the law that people would expect to govern their activity, regardless of whether reliance on that law affected their conduct.¹⁵² Territorialism also serves the objectives of foreseeability and comprehensibility "because of our innate tendency—due to the importance of territorial organization for daily social, political and economic life—to think in territorial terms."¹⁵³ Twerski ascribes to lawmakers, as well, a territorial orientation. The moral judgments reflected in a state's law should apply to events within the state.¹⁵⁴ All of these considerations, says Twerski, should lead the courts to focus on the time and space dimensions of a case, and "to view a juridical event in its total factual context to locate the vortex of that event."¹⁵⁵

148. Twerski, Book Review, *supra* note 138, at 1052. This would be true, even though in terms of Currie's interest analysis, the case would present a false conflict. See also the discussion of "territorialism and the false conflict" in Couch, *Louisiana Adopts Interest Analysis: Applause and Some Reservations*, 49 TUL. L. REV. 1, 5-8 (1974).

149. Twerski, Book Review, *supra* note 138, at 1047.

150. This is because, he says, people tend to orient their lives toward central focal points.

151. Twerski, *Emperor's Clothes*, *supra* note 144, at 120. In his view the essence of this is the "enlightened territorialism" of Professor Cavers and of the *Restatement Second*. *Id.*

152. As he puts it, "People have a right to expect a regularity and rhythm from the law. . . . To demean 'time and space' in the law of conflicts is to deny an important facet of human experience." Twerski, *Enlightened Territorialism*, *supra* note 135, at 382. A similar view has been expressed by Kegel, who notes that, "spatial factors are part and parcel of the stock-in-trade of conflicts law," Kegel, *supra* note 8, at 189.

153. Here Twerski borrows from von Mehren, *Recent Trends*, *supra* note 72, at 956. See also the discussion of "territorial organization" in CAVERS, *supra* note 136, at 134-36.

154. Twerski, *Enlightened Territorialism*, *supra* note 135, at 385.

155. Twerski, *Emperor's Clothes*, *supra* note 144, at 123. The "vortex of the

Locating the vortex of the event means emphasizing factual contacts and greatly downplaying the policies and interests of the involved states. In *Tooker*, for example, which in terms of interest analysis presents the false conflict, Twerski would say that New York should displace its own law because the vortex of the accident was in Michigan, where the parties were attending school and where the trip originated and was to end.¹⁵⁶ The emphasis being on time and space dimensions, the law of the state that is the vortex of the event should apply.¹⁵⁷

All of the underlying premises on which Twerski's "enlightened territorialism" is based are subject to the most serious dispute.¹⁵⁸ To say that people expect the law of a state having time and space connections with the transaction to govern, and that it would be "incomprehensible" if it did not, is truly to be self-serving. If people think in these terms—and it is doubtful that they do—it is only because they have been conditioned to do so by the traditional emphasis on territorialism in American law.¹⁵⁹ Territorial predilections still plague the courts¹⁶⁰ and the commentators,¹⁶¹ and it is easy to project them onto the general public. Moreover, many people do not live their lives oriented to particular states, but to what may be called functional socio-economic and mobility areas that cut across state lines.¹⁶² It seems somewhat anomalous to say that legal rights should depend on which side of the state line particular events occur if that state line is not functionally significant for the people who are involved in those events.¹⁶³ Territorialism ignores reality in favor of a hypothetical "expectation" which it may be doubted exists at all.

event" concept is very similar to the *Restatement Second's* "state of the most significant relationship" concept, at least insofar as the latter concept is not "swallowed up" by policy considerations. See note 58 *supra*.

156. Twerski, *Emperor's Clothes*, *supra* note 144, at 123.

157. In *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972), the victim was a resident of Kentucky, a recovery state, and the defendant was a resident of Ohio, a guest statute state, but worked in Kentucky. The trip began in Kentucky and was to end there. The accident occurred there. Twerski says that the vortex of the event was in Kentucky. Twerski, *Attach the Horses*, *supra* note 140, at 396-400.

158. Interestingly enough, Twerski's methodology ends up focusing on a single factor—factual contacts. Having criticized interest analysis for its single factor method, Twerski falls into the same purported error. Similarly, his demand for "sensitive judicial evaluation of complex issues of fact and law" is lost sight of in the quest for locating the vortex of the event.

159. As to the traditional emphasis on territorialism, see Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 4, at 37-41.

160. See Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 402, 410-12 (1971) [hereinafter cited as Sedler, *Territorial Imperative*].

161. See the discussion in Sedler, *Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, 57 IOWA L. REV. 1229, 1236 (1972).

162. A good example is the New York City metropolitan area which encompasses parts of New York, Connecticut and New Jersey. See Sedler, *Territorial Imperative*, *supra* note 160, at 398-99.

163. See *id.* at 407-12.

Twerski's contention that the moral judgment reflected in a state's law should apply only to events within that state¹⁶⁴ is also doubtful. Laws also reflect specific policies and it would seem that the law-giver is more concerned with the implementation of the policy than with expressing a moral judgment by applying the law to all persons located within the "vortex." It is most doubtful that the New York legislators who refused to enact a guest statute because they wanted passengers to be able to recover against the host and the host's insurer intended that recovery be denied to the New York plaintiff in a case like *Tooker* because the vortex of the event was not in New York. It is also most doubtful that they were making a moral judgment applicable only where New York was the vortex of the event. It would very likely be "incomprehensible" to the legislators and would defeat their "expectations" if a New York accident victim could not recover against the owner of a New York-insured automobile merely because the accident occurred in another state where the parties had "come to rest."¹⁶⁵ So too, since the insurer is required to cover the New York-insured automobile for out-of-state accidents, it would not be "incomprehensible" to it if it were required to pay for an accident where the vortex of the event was outside of New York. So long as a choice of law decision does not produce any unfairness, it cannot be viewed as "incomprehensible."

At bottom, the crucial disagreements between interest analysis and territorialism are over the purpose of conflicts law, and, in light of that purpose, over the resulting criteria for choice of law decisions. If the purpose is to produce sound results in the cases that come before the courts, this end is better effected by the use of interest analysis than by Twerski's territorialism which, it is submitted, represents a theoretical construct that bears no relationship to the realities of the world in which people live. These realities will be better served by making choice of law decisions with reference to the policies and interests of the involved states regardless of the vortex of the event.

2. Narrow, Policy-Based Rules

The other basic alternative to interest analysis is that of narrow, policy-based rules. Interest analysis, of course, eschews choice of law rules of any sort; in the view of many of its critics, this is its most serious failing.¹⁶⁶ While conceding that the rigid, territorially-based rules of the original *Restatement* were

164. Twerski, *Enlightened Territorialism*, *supra* note 135, at 385.

165. This phrase is borrowed from *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

166. See Hill, *supra* note 8, at 480-81; Juenger, *supra* note 61, at 210-11; Rosenberg, *supra* note 74, at 464.

unsatisfactory, some critics of interest analysis have now also become proponents of narrow policy-based rules. Professor Reese maintains that the "current unpopularity of rules in choice of law" is an overreaction to the failure of the *Restatement's* rules, particularly in the torts and contract areas, and that this "does not mean . . . that satisfactory rules cannot be devised [in these areas] . . . only that rules similar in character to those previously attempted are unlikely to prove successful."¹⁶⁷

Reese refers to interest analysis as an "approach" to choice of law. An "approach," to him, is a "system which does no more than state what factor or factors should be considered in arriving at a conclusion."¹⁶⁸ His reasons for preferring "rules" over "approaches"¹⁶⁹ are as follows:

Rules are employed in most areas of the law^[170]. . . because of the advantages that rules bring[:] . . . certainty and predictability . . . [and] the fact that they greatly facilitate the judicial task.^[171] All that a judge need do when deciding a question covered by a rule is to select the proper rule and then, after gaining an understanding of its provisions, to apply it. Far more difficult is the task of a judge when an approach is involved. Here he is told simply to consider one or more enumerated factors in arriving at his conclusion and usually is given little, if any, guidance as to the relative weight he should give these factors. As a result, each decision will be essentially ad hoc and the judge will rarely be able to rely upon, or even to obtain much guidance from earlier opinions.^[172]

Reese contends that it is now possible to develop narrow choice of law rules that are based on considerations of policy. In

167. Reese, *Rules or Approach*, *supra* note 9, at 319. As Professor Rosenberg has so neatly put it, "The problem is to escape both horns of the dilemma by avoiding both unreasonable rules and an unruly reasonableness that is destructive of many of the values of law and loses sight of the need for coordinating a multistate system, not merely vindicating substantive law policies." Rosenberg, *supra* note 74, at 464.

168. Reese, *Rules or Approach*, *supra* note 9, at 315.

169. Professor Reese, who was the Reporter for the *Restatement Second*, characterizes the general choice of law principles set forth in § 6 of the *Restatement* as an approach. *Id.*

170. In other areas of law, however, it may be noted that these rules generally are either contained in statutes or have been developed by judicial decision on a case by case basis. Unlike choice of law rules, they have not been formulated *a priori* and applied deductively to particular cases. See the discussion in Sedler, *Rules of Choice of Law*, *supra* note 3, at —.

171. Professor Leflar, however, has emphasized that the choice-influencing consideration of "simplification of the judicial task" does not justify the adoption of "mechanical" choice of law rules, and that "ease in judicial performance is ordinarily not of first importance among the choice-influencing considerations." Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587 (1966).

172. Reese, *Rules or Approach*, *supra* note 9, at 316-17.

formulating a rule, says Reese, there should be an effort "to determine whether in the great majority of situations a particular state will be that of greatest concern by reason of a particular contact irrespective of all other considerations, including the content of its relevant local law rule."¹⁷³ The rule should be designed to further the basic policy underlying the substantive law field with which it is concerned.¹⁷⁴ Protection of the "natural expectations of the parties," including the expectations that they presumably would have had if their minds had been directed to the issue at hand, is another relevant consideration in formulating particular rules.¹⁷⁵ Finally, Reese emphasizes that: "A choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results. Good rules, like other advantages, have their price."¹⁷⁶

Reese gives a number of examples of rules that he would formulate under these criteria: The law of the situs should govern questions such as who may own the land, the conditions under which it may be held, and the uses to which it may be put;¹⁷⁷ family immunity should be determined by the law of the domicile;¹⁷⁸ in the guest statute situation, where the guest and the host have a common domicile, the law of that state should apply.¹⁷⁹ Clearly a substantial start has been made toward the formulation of a body of narrow, policy-based rules.¹⁸⁰

My criticism of choice of law rules relates both to my view of how conflicts problems can best be solved and to the role of the courts in fashioning these solutions. Which approach, it should be asked, will generally produce better results: to decide each case with reference to the policies and interests of the involved states, or to formulate rules, however narrow and policy-based they may be? Built into any concept of choice of law rules, as Professor Reese admits,¹⁸¹ is the possibility of unsound results in particular cases. This possibility is not built into interest analysis and case-by-case

173. *Id.* at 326.

174. *Id.* at 330.

175. *Id.* at 329.

176. *Id.* at 334. As he also puts it:

More specifically, the fact that a choice of law rule which has stood the test of experience would lead on some rare occasion to the application of the law of a state which is not that of greatest concern, or would result in the disregard of other multistate or local law policies, is not an adequate reason why the rule should not be applied on that occasion. Perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result.

Id. at 322.

177. *Id.* at 327.

178. *Id.* See also Sedler, *Characterization*, *supra* note 93, at 65-68.

179. Reese, *Rules or Approach*, *supra* note 9, at 328.

180. See *id.* at 328-32.

181. See notes 175-76 & accompanying text *supra*.

adjudication.¹⁸² In addition, as will be pointed out shortly, once we recognize the responsibility of the courts to resolve conflicts problems and apply the normal workings of binding precedent and stare decisis to conflicts cases,¹⁸³ we will see that we will have *rules of choice of law*, based on the courts' decisions in actual cases, which will serve the same "predictability" function as choice of law rules without the built-in disadvantage of countenancing unsound results in particular cases.

The difference between the results reached by the application of choice of law rules, even if narrowly formulated and policy-based, and the results that build on a case-by-case analysis of the policies and interests of the involved states can be illustrated by a consideration of one of Professor Reese's proposed rules: Questions of family immunity should be determined by the law of the marital domicile. When spouses from a recovery state are involved in an accident in an immunity state, a false conflict is presented and the law of the marital domicile, as the law of the only interested state, should apply.¹⁸⁴ When spouses from an immunity state are involved in an accident in a recovery state, the same case in terms of interest analysis is not necessarily presented since the state where the accident occurred may see an interest in applying its law to allow non-residents injured there to recover.¹⁸⁵ The rule proposed by Professor Reese would foreclose judicial inquiry into the matter of policies and interests in such a case, which regardless of one's view of the legitimacy of the interest of the accident state, does, at least, raise a different question from that presented when spouses from a recovery state are involved in an accident in an immunity state.

Where the rule clearly may lead to unsound results is where policies other than those associated with family immunity are involved. Suppose that spouses from an immunity state are involved in a two-car accident in a recovery state. The driver of the other vehicle, a resident of the recovery state, is sued by the injured wife,

182. This does not mean that they could not occur, only that their existence is not built into the approach itself.

183. See generally Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 4, at 82-87 (discussion of judicial method).

184. See note 178 *supra*.

185. See Sedler, *Characterization*, *supra* note 93, at 61-62. While the parties' home state will always apply its own law in the event that suit is brought there, see, e.g., *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966), *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966), the question is likely to arise in the recovery state since the plaintiff can always bring suit there under that state's long-arm act. In my view, the state where the accident occurs does not have a real interest in applying its law in this situation because the social and economic consequences of the accident will not be felt in that state. See notes 253-55 & accompanying text *infra*. The courts of the accident state have for the most part, however, seen it differently and have applied their own law. See cases cited in note 253 *infra*.

and seeks to join the admittedly negligent husband as a third party defendant in order to obtain contribution from him. While the law of the state of injury would impose liability for contribution, contribution would not be permitted by the law of the spouses' home state, since one spouse is immune from tort liability to the other. Should the rule that spousal immunity is determined by the law of the marital domicile apply here?¹⁸⁶ Professor Reese concedes that it should not, because of possible unfairness to the defendant who resides in the accident state.¹⁸⁷ Thus, in order to avoid what Professor Reese considers to be an unfair result, the rule must be limited to the question of immunity as between the spouses, and a new rule must be developed to cover the contribution issue.

Even in cases involving only the spouses, however, Reese's rule may be too broad. Suppose that the case involves not an automobile accident but an intentional tort, so that the state of injury has an interest in applying its law in order to implement the admonitory policy it reflects.¹⁸⁸ Reese's rule would presumably require that the state of injury subordinate its admonitory policy to the immunity policy of the parties' home state. Such subordination, however, would be inconsistent with Reese's other observation that, "[t]he state where a person acts will almost certainly have the greatest concern in the application of its tort rule relating to standards of conduct, provided that the act did not measure up to the pertinent standard."¹⁸⁹ Is the rule that the law of the marital domicile governs going to be further qualified by limiting it to the situation where the tort arises out of an accident? Or are new rules going to be proposed to determine what law applies in the case of admonitory torts?

These examples suggest the problem inherent in any choice of law rules. While the rule seems neat and simple at the outset, it loses its simplicity when it runs up against the variety of fact-law patterns and the different amalgams of policies and interests that appear in actual cases. The notion that choice of law rules "greatly facilitate the judicial task"¹⁹⁰ is extremely doubtful. In practice, it is generally easier to decide cases on a case-by-case basis with reference to the policies and interests of the involved states than by the

186. For an "unthinking" application of the "rule" that the law of the domicile determines spousal immunity, see *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959), to this situation, see *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962). With the abandonment of the spousal immunity "rule," Wisconsin, as the recovery state, has had no difficulty in applying its own law on the contribution issue. See *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

187. Reese, *Rules or Approach*, *supra* note 9, at 321.

188. See Sedler, *Characterization*, *supra* note 93, at 67-68.

189. Reese, *Rules or Approach*, *supra* note 9, at 328.

190. *Id.* at 317.

application of any rule, however narrow and policy-based it purports to be, to a variety of fact-law patterns.

If empirical demonstration is needed for this proposition, it can be found in New York's experience with narrow, policy-based rules. Prior to its decision in *Neumeier v. Kuehner*,¹⁹¹ the New York Court of Appeals had been following interest analysis, and according to Reese, "because of the uncertainty and unpredictability it engendered," the court had been "deluged by appeals and wracked by dissent."¹⁹² In *Neumeier* the court, in reaction to this "uncertainty and unpredictability," and in reliance on the views of Reese and other rule-oriented commentators,¹⁹³ set forth rules governing choice of law in the guest statute situation, which could be extended by analogy to most accident cases.¹⁹⁴ Under the *Neumeier* rules, when the parties are from the same state, the law of that state applies, and when they are from different states, the normally applicable law is the law of the state where the accident occurred.¹⁹⁵

These rules seemed simple enough until the courts were called upon to apply them in particular cases. In *Rogers v. U-Haul Co.*,¹⁹⁶ a lower New York court was faced with the situation of an Alabama resident killed in a Pennsylvania accident as a result of the negligence of a New York driver operating a vehicle owned by U-Haul, a nationwide concern doing substantial business in New York. On the issue of U-Haul's liability, the court applied the rule that the law of

191. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

192. See note 85 & accompanying text *supra*.

193. 31 N.Y.2d at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

194. See *Rogers v. U-Haul Co.*, 41 App. Div. 2d 834, 342 N.Y.S.2d 158 (1973); Sedler, *Interstate Accidents*, *supra* note 61, at 135-37.

195. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70. The "text" of the rules is as follows:

(1) When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

(2) When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

(3) In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

In *First National Bank v. Rostek*, 182 Colo. 437, 447, 514 P.2d 314, 319 (1973), the Colorado Supreme Court adopted the first two *Neumeier* rules.

196. 41 App. Div. 2d 834, 342 N.Y.S.2d 158 (1973).

the state where the accident occurred governed when the parties were from different states. Pennsylvania law imposed no vicarious liability on U-Haul. Under New York law, however, U-Haul would have been liable. Since, for purposes of tort liability, U-Haul would be considered a New York defendant because of its substantial business activity in that state,¹⁹⁷ if Alabama law would also have imposed vicarious liability, in terms of interest analysis, the case would have presented a false conflict. The court, however, did not discuss Alabama law. Following the rule, it looked instead to the law of Pennsylvania, which had no interest in having its law applied on the point in issue, to the detriment of Alabama, which may have had such an interest.

Such a false conflict clearly was presented in *Chila v. Owens*,¹⁹⁸ a New York federal court case. The plaintiff was from New Jersey and the defendant from New York, both recovery states, while the accident occurred in Ohio, a guest statute state. Because the parties were from different states, the normally applicable law under the *Neumeier* rules was the law of Ohio, where the accident occurred. The court, however, treated the case as a false conflict and assimilated it to the rule that directed the application of the law of the parties' home state, even though the parties were from different states.¹⁹⁹ Further confusion has been engendered by the Second Circuit's decision in *Rosenthal v. Warren*,²⁰⁰ where a New York victim was killed in Massachusetts due to the negligence of a Massachusetts defendant. Massachusetts law limited recovery for wrongful death while New York law did not. Under the *Neumeier* rules, Massachusetts law should have been applied, but the Second Circuit, sitting as a New York state court, held that the *Neumeier* rules did not apply to limitations on wrongful death recovery because of New York's "strong public policy" against limiting liability in such cases.²⁰¹ Thus, whatever else may be said about the *Neumeier* rules, they certainly have not enhanced predictability or facilitated the judicial task in New York.²⁰² Indeed, not

197. *Pahmer v. Hertz Corp.*, 36 App. Div. 2d 252, 319 N.Y.S.2d 949 (1971).

198. 348 F. Supp. 1207 (S.D.N.Y. 1972).

199. The court also might have found the case to come within the third *Neumeier* "exception." See note 195 *supra*.

200. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

201. The court relied on *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968), where the New York court, applying an "interest and fairness" test, applied New York law on the issue of limitations on wrongful death recovery to an accident involving a New York victim and a Maine driver that occurred in Maine. For a discussion of *Miller* in relation to the *Neumeier* rules, see Sedler, *Interstate Accidents*, *supra* note 56, at 135-36.

202. For criticisms of the *Neumeier* rules, see Hancock, *Some Choice of Law Problems Posed by Antiquated Statutes: Realism in Wisconsin and Rule Fetishism in New York*, 27 STAN. L. REV. 775 (1975); Sedler, *Interstate Accidents*, *supra* note 57, at 130-42; Twerski, *Emperor's Clothes*, *supra* note 144, at 105; Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1, 2-3 (1976).

only do choice of law rules not facilitate the judicial task, but to the contrary they put constraints on it, and force the courts to circumvent the rule in order to achieve what they consider to be sound results in particular cases.

More significantly, the real alternatives are not choice of law rules or no rules at all, as Professor Reese and the other rules proponents have assumed, but choice of law rules versus rules of choice of law. As I have discussed fully elsewhere,²⁰³ rules of choice of law emerge from the decisions of the courts in actual cases through the normal workings of binding precedent and *stare decisis*. Since conflicts cases tend to fall into certain fact-law patterns, an analysis of the policies and interests of the involved states in a particular case can be related to the fact-law pattern presented in that case, and the decision can be applied directly or analogously to another case presenting the same or a similar pattern.

As will be pointed out subsequently, in practice courts that have abandoned the traditional approach generally make the choice of law decision with reference to the policies and interests of the involved states regardless of which approach to choice of law they purport to follow. This practice appears most clearly in the tort area, and has led to the development of clear rules of choice of law.²⁰⁴ What is even more interesting is that in most situations the courts agree on the preferred solution. For example, it is everywhere held by policy-centered courts that when two forum residents are involved in an accident in another state, the law of the forum will apply.²⁰⁵ Of almost equal universality is the rule of choice of law that when two parties from a recovery state are involved in an accident in a non-recovery state, recovery will be allowed.²⁰⁶ Similarly, the courts are in agreement that the tort liability of an employer with respect to an employee who is covered by workmen's compensation is determined by the law of the state where the employer has taken out workmen's compensation to cover the particular employee.²⁰⁷

Interest analysis then, which is premised on case-by-case determination, is not necessarily inconsistent with the development of "rules" in the choice of law process. But the "rules" will be rules of choice of law, based on the decisions of the courts in actual

203. Sedler, *Rules of Choice of Law*, note 3 *supra*.

204. *See id.* at —, —.

205. *Id.* at —, & cases cited therein.

206. *Id.* at —, & cases cited therein.

207. *Id.* As will be discussed subsequently, *see* notes 240-42 & accompanying text *infra*, this also illustrates the situation where the employee's home state concludes that it has no real interest in applying its law that allows additional recovery.

cases, not choice of law rules, formulated *a priori* and applied, as best the courts are able, to the differing fact-law patterns that come before them.

III. CRITICISMS OF CURRIE'S SOLUTION TO THE TRUE CONFLICT

Currie's contention that in the case of a true conflict the forum should apply its own law has been criticized on what may be called methodological as well as policy grounds. There is disagreement with Currie's assertion that the only rational way that a court can resolve a true conflict is by the application of its own law, and it is further contended that it is improper and unprincipled to resolve a true conflict in this manner. These lines of criticism will be considered separately.

A. *Can a Court Resolve a True Conflict Other Than by the Application of Its Own Law?*

Currie's contention that the forum should apply its own law in the case of the true conflict is based on the premises that courts lack the resources to decide which interest should be required to yield and that the determination of which state has the greater interest is a "political function of a very high order that should not be committed to courts in a democracy."²⁰⁸ Currie's critics dispute the contention that the forum cannot weigh conflicting interests by noting that Currie says that in the case of the apparent conflict the court should try to avoid the conflict by a "more moderate and restrained interpretation" of the policy or interest of one state. If the court has the resources to make that determination, they argue, it has them in the case of the true conflict as well.²⁰⁹ Both processes, in the view of the critics, involve the weighing of interests, and to the extent that Currie recognizes weighing of interests in one situation and not in the other, interest analysis is found "internally inconsistent."²¹⁰

Currie responds to this criticism by saying that the apparent conflict and the true conflict are two very different situations. In the case of the apparent conflict "reasonable men may differ whether a conflicting interest should be asserted." A true conflict, on the other hand, presents the situation where, "after careful analysis, reasonable men tend to agree that neither court can, with fidelity to the interest of its own state, defer to the interest of the other."²¹¹ While there is a similarity between the analyses required in the two situations, the difference in the objectives of those analyses seems

208. See notes 49-51 & accompanying text *supra*.

209. Juenger, *supra* note 61, at 206-08; Traynor, *supra* note 44, at 855-61.

210. CAVERS, *supra* note 136, at 147-48; Traynor, *supra* note 44, at 855.

211. Currie, *The Disinterested Third State*, *supra* note 1, at 764. See also *The Verdict of Quiescent Years*, in CURRIE, *supra* note 1, at 603-06 (article originally published at 28 U. CHI. L. REV. 258 (1961)).

more significant than the similarity of their processes. Currie's position is that it is proper for a court to try to avoid a true conflict, but not to try to resolve a true conflict when it cannot be avoided.²¹² It is, thus, the distinction Currie draws as to the propriety of the judicial goal in the two situations upon which criticism more properly should be focused.

It has been said that Currie's contention that the courts lack the resources to resolve a true conflict is "equally applicable to a very large percentage of our judge-made rules of law."²¹³ The court's responsibility, it is argued, is to decide the case before it; that the legislature may be "better equipped to make the necessary judgment if it has not in fact done so" is irrelevant.²¹⁴ Currie's proscription of interest-weighting, one critic concludes, "seems to strike at the heart of the judicial process."²¹⁵ Similarly, the critics reject the argument that interest weighing requires the court to engage in a political function. It is contended that interest weighing is no more of a political function than sacrificing the forum's interests by a more moderate and restrained interpretation of the forum's policy or interest.²¹⁶ It has also been said that the political function argument is limited to "super-value" judgments, such as which law is the "better law."²¹⁷ Finally, it is contended that the court may resolve a true conflict by redefining interests and looking to the forum's "broader governmental interest" instead of to its interest in applying a particular rule of substantive law. Recognition of these "broader interests" may dictate displacement of the forum's own substantive law, and thus the true conflict in effect will be avoided.²¹⁸

Here the critics would seem to have the better of the argument. Courts can resolve true conflicts by using what resources are at hand. To call such action a political function is but another way of saying that the courts should prefer their own policy or interest. It is not an independent reason for a court to refuse to resolve a true conflict. Currie's antipathy toward choosing one interest over another may be minimized once it is recognized that the true conflict can be resolved by means other than determining which state has the "greater interest." Other theorists have developed solutions for the true conflict that generally are not based on interest weighing. They are based instead on considerations relating to the

212. In the reformulation of interest analysis, the matter of a "more moderate and restrained interpretation" will be subsumed in the determination of the forum's real interest in applying its own law.

213. Baxter, *supra* note 44, at 21.

214. *Id.* at 22.

215. Traynor, *supra* note 44, at 853.

216. Hill, *supra* note 8, at 475-77.

217. Baxter, *supra* note 44, at 22; Horowitz, *supra* note 44, at 753.

218. Hill, *supra* note 8, at 492.

needs of the federal system, the nature of the laws involved, expectations of the parties and the like. These solutions have been embodied in comprehensive methodologies that have been fully set forth by their proponents;²¹⁹ it is not necessary to discuss them here. Some of these methodologies build largely on interest analysis while others include it to a lesser extent. All, however, propose solutions to the true conflict, other than the application of the forum's own law, which do not require the court to engage in interest-weighting or to determine which state has the greater interest. It, thus, appears that Currie has overstated the case for forum law in the true conflict situation. His argument that a court cannot resolve true conflicts by means other than application of the forum's law has been refuted effectively by the development of these alternative solutions.

B. *Is It Improper for a Court to Resolve a True Conflict Solely by the Application of Its Own Law?*

Assuming that a court can resolve a true conflict by means other than the application of its own law, the question remains whether it *should* do so. Critics of Currie's position with respect to the resolution of true conflict assert that the forum's preference for its own law would in many instances be "lawlessness of a high order,"²²⁰ and would "encourage forum shopping."²²¹ It would also require disregard of policies other than those reflected in the substantive laws of the involved states, which it is said, ignores the possible disappearance in the multistate context, of policies that may be applicable in the purely domestic setting.²²²

Professor Von Mehren has also leveled the charge that Currie's approach to the resolution of the true conflict is unprincipled. The

219. For a discussion of functional analysis, see generally R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971) [hereinafter cited as WEINTRAUB]. (The Weintraub approach is summarized in CRAMTON, CURRIE & KAY, *supra* note 1, at 362-64); D. TRAUTMAN & A. VON MEHREN, THE LAW OF MULTISTATE PROBLEMS (1965) (The Trautman and von Mehren approach is summarized in CRAMTON, CURRIE & KAY, *supra* note 1, at 359-62).

For a discussion of comparative impairment, see Baxter, note 44 *supra*. After his seminal article, Professor Baxter left the field of conflicts for other academic pursuits. See also Horowitz, note 44 *supra*.

For a discussion of Cavers' principles of preference, see CAVERS, note 136 *supra*. This approach is summarized in CRAMTON, CURRIE & KAY, *supra* note 1, at 326-33.

For a discussion of Leflar's choice-influencing considerations, see R. LEFLAR, AMERICAN CONFLICTS LAW, ch. 11 (1968); Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Leflar, *More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). Leflar's approach is summarized in CRAMTON, CURRIE & KAY, *supra* note 1, at 313-16. Solutions to the true conflict are also proposed by Professor Shapira. SHAPIRA, *supra* note 64, at 181-98.

220. Rosenberg, *supra* note 74, at 468.

221. Couch, *supra* note 148, at 15. See also Baxter, *supra* 44, at 9-10.

222. von Mehren, *Recent Trends*, *supra* note 72, at 937.

principled application of rules of law, says Von Mehren, requires that similar treatment be accorded "equivalent patterns of value and purpose;"²²³ thus forum preference in the case of the true conflict is unprincipled because it applies to one case a rule that it is not prepared to generalize for all analogous cases.

These criticisms of Currie's view as to the proper resolution of the true conflict, rather than coming to grips with the question of why the forum should refuse to apply its own law when it has an interest in doing so, simply assume the validity of their own premises. It is not "lawless" for the forum to apply its own law when this does not produce fundamental unfairness to either of the parties, unless it is assumed that the only "lawful" solution is to employ some other means of resolution. Nor has any demonstration been made as to why "forum-shopping" for a more favorable law is undesirable. If two states are involved with the parties and the transaction in question, each of which constitutionally may apply its own law, and one of which allows the plaintiff to recover, there is nothing improper in the plaintiff's suing in the state allowing recovery and in obtaining recovery under its law.²²⁴ Such an outcome is improper only if it is assumed that the result should not differ depending on where the suit is brought, and that alleged uniformity is worth the price of sacrificing forum interests.

Similarly, to fault Currie's resolution of the true conflict because it does not take into account policies other than those reflected in the substantive law of the forum also begs the question. It assumes that these other policies are entitled to be given great weight in a conflicts case, but does not explain why they are to be given more weight than the forum's interest in advancing the policy reflected in its substantive law. Since the essential premise of interest analysis is that choice of law decisions should be made with reference to the policies and interests of the involved states, the application of the forum's law in the case of the true conflict cannot be faulted for failing to take into account other policies that are not considered germane in light of that essential premise.

As to the charge that Currie's approach to the resolution of the true conflict is unprincipled, what is or is not principled depends on the formulation of the underlying principle. It is unprincipled to apply the forum's law in the case of the true conflict only if the underlying principle is that the same case should not be decided differently depending on where suit is brought. On the other hand, if

223. *Id.* at 941-43. Professor von Mehren notes, however, that in an "imperfect community"—one that lacks a common legislature and judiciary—principled results in this sense are difficult to attain in practice, because "each of the involved legal orders hesitates to adopt principled solutions for fear that the others will be less principled." *Id.* at 943.

224. See notes 264-67 & accompanying text *infra*.

the underlying principle is that courts should adopt a uniform approach to conflicts cases, Currie's resolution is most principled in that it advocates that each forum should apply its own law in the case of the true conflict.

The critics, it is submitted, have not demonstrated why it is necessarily improper for the forum to resolve the true conflict by the application of its own law. At the same time, alternatives to the resolution of the true conflict other than by the application of the forum's own law exist which are not inconsistent with the premises on which interest analysis is based. Thus, the basic question is which approach to the resolution of the true conflict will achieve sound and fair results in practice, and will best accommodate the interests of all states in the context of conflicts litigation. It is my contention that in the case of the true conflict the forum should apply its own law, although my reasons for this view are to some extent different from those advanced by Currie. This submission will be developed fully in section IV.

IV. A REFORMULATION OF CURRIE'S GOVERNMENTAL APPROACH

A. *The Need for a Reformulation*

As has been noted, Currie's governmental interest approach was developed against the background of the rigid, territorially-based rules of the original *Restatement* and was designed to present a wholly new approach to choice of law. It was formulated as an academic approach, having as its objective the identification and resolution of interest situations and was not directed as such toward assisting the courts in deciding the cases that come before them. As formulated by Currie, interest analysis may seem unduly complex to the courts, and particularly in view of Currie's proposed solutions, may call for unnecessary steps when it is being applied by the courts in the process of deciding actual cases.

Moreover, in determining interests, Currie's methodology focused on possible or hypothetical interests, the initial inquiry being directed toward whether both of the involved states had such interests in applying their laws. If both states appeared to have such an interest, Currie saw the case as presenting an apparent conflict. At this point in Currie's methodology, it was necessary for the forum to reexamine the respective policies and interests of the involved states, and to ask whether a more moderate and restrained interpretation of the policy or interests of one of the states could avoid the conflict.²²⁵ It was this aspect of Currie's methodology that caused considerable confusion and criticism.²²⁶ Whether such

225. See notes 46-47 & accompanying text *supra*.

226. See notes 209-10 & accompanying text *supra*.

confusion is warranted or not,²²⁷ the fact that it exists impairs the effectiveness of Currie's methodology, particularly for use by the courts.

Secondly, while for academic purposes it is necessary to distinguish between false conflicts and true conflicts, the distinction need not trouble the courts: In either situation Currie advocates that the forum should apply its own law. Analysis of these two situations, as well as the matter of a "more moderate and restrained interpretation" of the forum's policy or interest can be subsumed in one test: looking to *real interests*.²²⁸

The matter of real interests lies at the heart of my reformulation of Currie's governmental interest approach. The crucial question for the forum court in a conflicts case should be whether the forum has a real interest in applying its own law in order to implement the policy reflected in that law. When the forum decides that it does have a real interest in applying its own law, it has necessarily determined that any conflict between its policy and interest and those of another state cannot be avoided by a "more moderate and restrained interpretation" of its own policy or interest. It is only if and when the forum has concluded that it has no real interest in applying its own law that it should be concerned about the policy and interest of the other state.²²⁹ In other words, the interests of the forum and of the other involved state should be considered independently in making the choice of law decision.²³⁰

This reformulation of Currie's methodology of interest analysis²³¹ would eliminate, as far as the courts applying it would be concerned,²³² the categories of false conflicts, apparent conflicts and true conflicts. It would not affect as such the unprovided-for case. The interest situations, then, would be: (1) the situation where the forum has a real interest in applying its own law (the true conflict, and the false conflict where the forum is the only interested state); (2) the situation where the forum does not have a real interest in applying its own law, but the other involved state does (the false

227. See notes 211-12 & accompanying text *supra*.

228. For an earlier discussion of the difference between real and hypothetical interests, see Sedler, *Symposium—Conflict of Laws Round Table: The Value of Principled Preferences*, 49 TEX. L. REV. 224, 225 (1971).

229. This will substantially reduce the number of cases in which the forum will have to be concerned with the policy and interest of the other involved state.

230. As to the relevance of the "obvious interest" of the other involved state when the forum is determining its own real interest, see note 236 & accompanying text *infra*.

231. This reformulation is designed to do much more than redefine Currie's interest situations. Essentially it is designed to separate the determination of the forum's policy and interest from the determination of the policy and interest of the other involved state and to make the choice of law decision depend primarily on the forum's determination of its own policy and interest.

232. I think that Currie's original formulation is still extremely useful for teaching purposes.

conflict brought in the disinterested state); and (3) the unprovided-for case (where neither state has an interest).

It should be noted, of course, that in any choice of law case, considerations of fairness to the parties is an independent value. A court will not make a choice of law decision that would be fundamentally unfair to either or both parties.²³³ Even possible unfairness to the parties should influence the choice of law decision.²³⁴ As will be demonstrated, however, in most cases where the forum has a real interest in applying its law on the point in issue, the application of its law will not be fundamentally unfair. Conversely, the same factors that would produce possible unfairness in the application of a state's law often will also indicate the lack of a real interest in applying that law. In practice, fairness to the parties generally has not been a problem, but where appropriate, the courts have carefully considered the fairness question and have pointed out why no unfairness results from their choice of law decision in the particular case.

The matter of determining whether the forum has a real interest will be examined at length. My views as to why the forum should apply its own law whenever it has a real interest in doing so and as to how the unprovided-for case should be resolved will be discussed next. Finally, certain other aspects of interest analysis that appear significant in light of this formulation will be examined.

B. *The Matter of Determining the Forum's Real Interest*

In determining whether the forum has a real interest in the application of its law on the point in issue, the court essentially must decide whether the policy behind the forum's rule will be *significantly advanced* by its application to a situation containing a foreign element.²³⁵ In the process of answering that question the court is necessarily aware of what may be called the "obvious interest" of another state when such an interest is present. For example, when two parties from a non-recovery state are involved in an accident in a recovery state and suit is brought in the recovery state, it is obvious that the parties' home state is interested in applying its law on the point in issue, since the consequences of imposing liability will be felt there. That factor may influence the forum in deciding whether the policy reflected in its law allowing recovery will be

233. By "fundamental unfairness," I mean such unfairness that comes close to being a due process violation. See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See also notes 312-18 & accompanying text *infra*.

234. See note 237 & accompanying text *infra*.

235. Some aspects of the comparative impairment principle relate to avoiding a true conflict rather than to resolving it, and these aspects may be useful in determining whether the policy behind the forum's rule will be significantly advanced by its application in the particular case. See Horowitz, *supra* note 44, at 726, 739-41, 744, 749-50, 753-54.

significantly advanced in the case, but it is a secondary factor that should not obscure the forum's concern with its own policy and interest.²³⁶ Similarly, the possible unfairness to the parties resulting from the application of the forum's law may come into play, but again only in the context of deciding the "significantly advanced" question. The point to be emphasized is that the focus is on whether the policy behind the forum's law will be significantly advanced by its application to this situation containing a foreign element; other considerations are relevant only insofar as they assist in the resolution of this question.²³⁷

It was earlier demonstrated that ordinarily it is not difficult to determine the policies behind a state's law and the interest of a state, in light of those policies, in applying its law to a particular situation containing a foreign element.²³⁸ The interests toward which that discussion was directed should be viewed as real interests for our present purposes, and the criteria outlined there as criteria for the determination of real interests. Thus, a state has a real interest in applying its law when,

the reasons or governmental interests behind the state's policy are such that the state has a logical, rational, legitimate cause to apply its policy to the case in question . . . because the local elements of the case—the parties, the subject matter, the transaction, the accident, the injury—bear a rational relationship to the reasons and interests behind the policy of the state.²³⁹

The matter of determining the forum's real interest can perhaps be demonstrated most clearly by a consideration of cases in which the forum concluded that it did *not* have an interest in applying its own law because the policy reflected in that law would not be significantly advanced. These cases prove that application of the forum's own law does not necessarily follow from use of interest analysis, and further demonstrate how the concept of real interest operates to identify those situations where the forum will not apply its own law.

236. However, as Currie noted, the court "must reckon with the fact that an immoderate and provincial determination may lead to a serious conflict with the policies and interests of a foreign state." *The Silver Oar and All That: A Study of the Romero Case*, in CURRIE, *supra* note 1, at 370 (article originally published at 27 U. CHI. L. REV. 1 (1959)). "And it is clear that the courts of a state may properly take into account the possibility of conflict with the interests of other states in determining what domestic policy is and how far domestic interests extend." *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in CURRIE, *supra* note 1, at 498 (article originally published at 69 YALE L.J. 1323 (1960)).

237. Again, my purpose is to make the choice of law decision depend primarily on the forum's determination of its own policy and interest.

238. See notes 90-129 & accompanying text *supra*.

239. Kramer, *supra* note 119, at 532.

One series of cases in which the forum has uniformly held that its own law was inapplicable involves tort claims of injured employees against employers who have attempted to cover work-related injuries by workers' compensation. Conflicts problems arise when the employment relationship is connected with more than one state, the laws of which differ on the question of whether the employee can maintain a common law tort action against a particular employer. In *Wilson v. Faull*,²⁴⁰ for example, a New Jersey employee of a sub-contractor was injured while working in Pennsylvania due to the negligence of the general contractor. Pennsylvania law required general contractors to take out workmen's compensation to cover employees of sub-contractors and immunized general contractors from tort liability to such employees. Under New Jersey law, however, general contractors were not required to cover employees of sub-contractors, and correspondingly, were subject to tort liability. The New Jersey court held its law inapplicable and sustained the employer's defense to tort liability under Pennsylvania law.

Under the law of New Jersey, as well as Pennsylvania, work-related injuries generally were dealt with by workers' compensation. The plaintiff in *Wilson* had recovered workers' compensation from the sub-contractor, so the basic policy of New Jersey that work-related injuries should be compensated had been satisfied as to his recovery. While New Jersey and Pennsylvania differed over the availability of additional compensation by way of tort liability, provisions for such additional compensation constituted a narrow segment of New Jersey's policy with respect to work-related injuries. Thus, New Jersey's basic policy would in no way be impaired if additional compensation were not awarded in such a case. Moreover, the employer had complied with Pennsylvania law requiring that he cover the particular employee by workers' compensation and, in turn, relied on Pennsylvania law to give him immunity from tort liability to such employees. While the possible unfairness in denying the employer the benefit of Pennsylvania law might be relevant in determining whether New Jersey had a real interest in applying its law here, more to the point is the fact that the employer (as well as the sub-contractor) was required to take out worker's compensation to cover the particular employee, thus satisfying New Jersey's basic policy as to employer liability.

Wilson is illustrative of the courts' uniform practice. When an employee seeks to recover in tort for work-related injuries, the courts look to the law of the state where the employer has taken out workers' compensation to cover the employee.²⁴¹ Where the forum's law allows additional compensation, but the law of the

240. 27 N.J. 105, 141 A.2d 768 (1958).

241. See Sedler, *Rules of Choice of Law*, *supra* note 3, at —.

workers' compensation state does not, the courts have concluded that the forum has no real interest in applying its own law.²⁴²

A case where a California court refused to apply California law to a situation containing a foreign element further illustrates the operation of the real interest test. In an automobile forfeiture proceeding, a California statute requiring the holder of a security interest in an automobile to make a "reasonable investigation" into the character of the purchaser was held inapplicable to a transaction occurring in Texas, notwithstanding that the automobile was subsequently seized in California while being used for the unlawful transportation of narcotics.²⁴³ The court emphasized that it would be unfair to require the Texas security holder to conform his behavior to the California standard when acting in a state some distance away.²⁴⁴ As this consideration related to the determination of real interests, it also demonstrated that California's policy with respect to requiring a "reasonable investigation" would not be significantly impaired if it did not apply to the very rare situation where the automobile was purchased in another state some distance away, subsequently taken into California and used for an unlawful purpose there. Thus, California had no real interest in applying its law to this situation containing a foreign element.

In another case,²⁴⁵ a California resident solicited a finder's fee by sending a letter to an officer of a New York-based corporation, advising him that a California-based company might be for sale and that he should reply if interested. The defendant did not reply, but did eventually acquire the California company. The plaintiff sued in California, alleging that under California law, he was entitled to recover reasonable compensation if the defendant took advantage of the "tip." Under the New York statute of frauds, the defendant would not be liable. The court observed that while New York had a "clear" interest in applying its law to protect its resident defendant from liability, California's interest in applying its law to allow recovery was "much less apparent."²⁴⁶ The policy behind California law awarding reasonable compensation for making use of tips

242. In practice the courts do not distinguish between the situation where the employee is a forum resident and the situations where the employee is a non-resident.

243. *People v. One 1953 Ford Victoria*, 48 Cal.2d 595, 311 P.2d 480 (1957).

244. See *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976). If the defendant's place of business was located in close proximity to California, as in *Bernhard*, there would be a greater likelihood that his failure to make a "reasonable investigation" would result in automobiles being used for an illegal purpose in California. In that situation California's policy might be significantly impaired if it were not applied to the defendant's activity, and the proximity of that activity to California would make the application of California law clearly reasonable.

245. *Denny v. American Tobacco Co.*, 308 F. Supp. 219 (N.D. Cal. 1970).

246. *Id.* at 223.

would not be impaired if it was not applied to the situation where there were no dealings between the parties, such as where a non-resident defendant made no response to an initiative of a California plaintiff.²⁴⁷ Again, California had no real interest in applying its law to this particular situation containing a foreign element.

A final example of the lack of a real interest on the part of the forum is *In re Estate of Clark*.²⁴⁸ There the question was whether a New York statute authorizing a testator to provide that the validity and effect of testamentary dispositions with respect to movables situated in New York be governed by New York law, was applicable to bar the right of the surviving spouse to take against the will. Such a right was recognized by the law of the marital domicile, but, in the circumstances presented, would not be recognized by New York. The statute reflected New York's policy of encouraging parties to deposit property in New York banks by enabling them to make an express choice of law.²⁴⁹ Normally, however, the right of a spouse to take against the will is governed by the law of the marital domicile.²⁵⁰ Thus this obvious interest of the domicile was relevant in determining whether the New York statute should apply.²⁵¹ The court concluded that New York's policy of encouraging out-of-staters to deposit property in New York banks would not be significantly impaired if it did not apply to so fundamental a question as the right of the spouse to take against the will, and held the statute inapplicable. In effect it was saying that New York had no real interest in applying its law on the question of whether a non-resident spouse has the right to take against the will with respect to movable property situated in New York.

As these cases demonstrate, courts will generally determine their own interests and the scope of their own policy with restraint and moderation, and will not apply their own law where they conclude that the policy reflected in that law will not be significantly advanced by its application in the circumstances presented. This does not mean that courts will always agree on what constitutes a real interest, any more than they will always agree on any other

247. If the defendant had responded to the solicitation, there is greater likelihood that California would have found that it had a real interest in applying its law here, and it would not have mattered that under New York law the defendant could not incur liability by taking advantage of the tip. By the same token, such response would have removed any question of possible unfairness in the application of California law. See *Cook Associates v. Colonial Broach & Mach. Co.*, 14 Ill. App. 3d 965, 304 N.E.2d 27 (1973).

248. 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

249. See, e.g., *Wyatt v. Fulrath*, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965).

250. 21 N.Y.2d at 486-87, 236 N.E.2d at 156-57, 288 N.Y.S.2d at 999-1000.

251. This is what is meant by a consideration of the "obvious interest" of the other involved state in the determination of the forum's own real interest. See notes 236-37 & accompanying text *supra*.

question. For example, when two parties from a non-recovery state are involved in an accident in a recovery state, and suit is brought in the recovery state,²⁵² the courts have disagreed on the preferred result, with the majority coming down in favor of the application of their own law allowing recovery.²⁵³ Sometimes courts that have applied their own law in this situation justly can be accused of "straining" to find an interest.²⁵⁴ On the whole, however, the courts have not applied their own law when they have not seen a real interest in doing so.²⁵⁵

C. *The Application of the Forum's Law to Implement Its Real Interest*

Once the forum determines that it has a real interest in applying its law the court should apply it, without considering whether any other involved state also has a real interest in the application of its own law.²⁵⁶ The primary reason for my advocating such application of forum law is my view that in a conflict case the proper function of a court is to advance its own policies and interests rather than to advance "multistate policies." Whenever the forum has decided that it has a real interest in the application of its law, it has necessarily concluded that the policy behind the law would be significantly impaired if it were not applied to this particular situation containing a foreign element. It is clearly legitimate for a court to decide that the implementation of that policy is more important than implementation of "multistate policies;" courts simply do not view their function in a conflicts case to be that of "policing the interstate and international legal order." In practice, courts tend to see a conflicts case as essentially a domestic case with a foreign element added; when the same reasons that call for the application of their law in a domestic case are equally present in a conflicts case, they naturally enough want to apply their own law. The validity of this approach, it is submitted, must be tested with reference to the results it produces in actual litigation. The following examination of cases illustrates that the approach produces what may be considered to be sound and fair results, and thus cannot be faulted because it prefers the forum's real interest over "multistate concerns."

252. As it generally can be under that state's long-arm act.

253. See Sedler, *Rules of Choice of Law*, *supra* note 3, at —.

254. See note 131 & accompanying text *supra*.

255. Interestingly enough, some commentators who have advanced alternative solutions to the true conflict advocate application of the law of the state of injury in this situation. See CAVERS, *supra* note 136, at 139-45; Hancock, *supra* note 202, at 781-82; Trautman, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 468, 469-72 (1967).

256. It should be reiterated that considerations of fairness to the parties ordinarily have been subsumed in the real interest test. See notes 243-47 & accompanying text *supra*.

In tort cases in which the plaintiff is from a recovery state and the defendant from a non-recovery state, a true conflict is necessarily presented irrespective of where the accident occurs, since the 'social and economic consequences of allowing or denying recovery will be felt in both the parties' home states. The plaintiff's home state has a real interest in applying its law to provide compensation for its injured resident while the defendant's home state has a real interest in protecting its resident defendant and insurer from liability. When the suit has been brought in the defendant's home state, it has always applied its law to deny recovery.²⁵⁷ However, when the suit has been brought in the plaintiff's home state (where it frequently can be brought although the accident occurred in the defendant's home state or another non-recovery state),²⁵⁸ with few exceptions²⁵⁹ that state has applied its own law irrespective of where the accident occurred,²⁶⁰ and even if the accident was not factually connected

257. See note 291 *infra*.

258. Where the injury occurs in the defendant's home state, long-arm act jurisdiction is not ordinarily available in the plaintiff's home state. But it may be available if the circumstances leading up to the accident had factual connections with that state, even though the accident itself occurred elsewhere, as in *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972). The defendant may be an enterprise doing business in the plaintiff's state, so that jurisdiction can be obtained on that basis. In New York jurisdiction can be obtained by attaching the obligation to defend of the non-resident's insurer, which is likely to be doing business in New York, under *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). See *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). Assuming that *Seider* is still constitutional after *Shaffer v. Heitner*, 97 S.Ct. 2569 (1977), see *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977), the New York plaintiff injured elsewhere then will probably be able to sue in New York. On the other hand, assuming that the rationale of *Shaffer* renders unconstitutional the exercise of *in personam* jurisdiction on the basis of personal service alone, it will no longer be possible for the nominal defendant in the guest statute situation to arrange to be served in the plaintiff's home state, as occurred in *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970).

259. The exceptions to this practice in recent years are as follows: *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971), where, as will be discussed at note 267 *infra*, a question of fairness may have been involved; *Pryor v. Swarner*, 445 F.2d 1272 (2d Cir. 1971), where a federal court applying New York conflicts law, and anticipating the *Neumeier* rules, which had been previewed in Judge Fuld's concurring opinion in *Tooker*, did not apply New York Law allowing recovery in favor of a New York guest passenger injured by a host-driver from a guest statute state in a guest statute state; and *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970), where, as I have discussed elsewhere, see Sedler, *Territorial Imperative*, *supra* note 160, at 401-02, "territorial hang-ups" may have caused the forum to refuse to apply its law when the accident was connected entirely with the state of injury.

In *Casey v. Manson Const. & Eng'r Co.*, 247 Or. 274, 428 P.2d 898 (1967), the Oregon court failed to apply Oregon law allowing recovery for loss of consortium in favor of an Oregon plaintiff whose spouse was injured by a Washington defendant in Washington. The present authority of that case has subsequently been questioned, however, see *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 611-12 (9th Cir. 1975), and it might not be followed today.

260. See *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973); *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Schwartz v. Consolidated Freightways*, 300 Minn. 487, 221 N.W.2d 665 (1974); *Schneider v. Nicholas*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

with the forum.²⁶¹

The application of the forum's law in the accident situation, whether to allow or to deny recovery, produces sound results in that a forum is never called upon to sacrifice, but rather can always advance, its own real interests. While the outcome will depend on where suit is brought, this in no sense detracts from the soundness of the result. In the first place, suit cannot be maintained in the plaintiff's home state unless the defendant has sufficient minimum contacts with that state to make its exercise of jurisdiction reasonable.²⁶² Second, while uniformity of result is not achieved, it has long been recognized that under any approach to choice of law, uniformity of result is a practical impossibility;²⁶³ advancement of the forum's real interests should not be sacrificed in the search for an illusory uniformity.²⁶⁴ Third, when two states are involved with the parties and the transaction in question, each of which constitutionally may apply its own law, and one of which allows the plaintiff to recover, it is not unreasonable to permit the plaintiff to go into the state that allows recovery and to obtain recovery under its law.²⁶⁵

Moreover, the application of forum law in tort cases, whichever the forum, is not likely to produce any unfairness to either party. In tort cases unfairness in the application of the law of a particular state can result only if a party could not foresee being held liable under the standard set forth in the law of that state and so could not be expected to insure against it,²⁶⁶ or if a party relied on the law of

261. As in *Rosenthal, Miller and Turcotte*.

262. See note 258 *supra*.

263. As was true even when all courts were following the traditional approach, both because of genuine disagreement as to the correct application of the choice of law rules and because of the use of manipulative techniques. See Sedler, *Babcock v. Johnson in Kentucky*, *supra* note 4, at 48-49.

264. As Currie has put it, the sacrifice of the forum's interests "seems an extravagant price to pay for uniformity of result—the more so since the attainment of that goal is in fact problematical." *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in CURRIE, *supra* note 1, at 101 (article originally published at 25 U. CHI. L. REV. 227 (1958)).

265. An analogy may be drawn here to the German practice of applying the law most favorable to the plaintiff in tort cases where the act and harm occur in different states. See 2 E. COHN, *MANUAL OF GERMAN LAW* 135 (2d ed. 1968); U. DROBNIG, *AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW* 213-14 (1972).

266. Thus in *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976), there was no unfairness in subjecting the Nevada tavern-keeper to the California standard, since the tavern-keeper's place of business was located close to the California state line and he solicited California customers. It was foreseeable that an intoxicated customer could cause an accident in California, which is what happened in that case. The same rationale justifies the exercise of long-arm jurisdiction over the out-of-state manufacturer whose products cause injury in the forum. See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal.2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

another state and conformed its conduct to the requirements of that law in circumstances where it was reasonable for that party to do so.²⁶⁷ The absence of unfairness in applying the law of the plaintiff's home state to allow recovery even though the accident occurred in the defendant's home state and was not factually connected with the plaintiff's home state is illustrated by *Miller v. Miller*.²⁶⁸ In that case, a fatal accident occurred in Maine involving a New York victim and a Maine defendant. Maine limited the amount recoverable for wrongful death; New York did not. Suit was brought in New York, where the defendant subsequently had moved.²⁶⁹ In holding that there would be no unfairness in applying New York law on the issue of limited liability for wrongful death, the court noted that the defendant's liability insurance policy covered out-of-state accidents, and that insurance policies do not distinguish between liability for personal injuries and liability for wrongful death. Thus, the defendant and the insurer could have expected to be held to unlimited liability,²⁷⁰ and would not be prejudiced by being held to that standard merely because the accident occurred in Maine rather than in New York.²⁷¹

267. This may have been the situation in *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971). There the plaintiff, a resident of New Hampshire and an employee of a New Hampshire contractor, was injured while working on land in Massachusetts owned by a corporation having its principal place of business there. Suit was brought in a federal court in New Hampshire, where the defendant was also doing business. Under Massachusetts law a landowner owed the same duty of care to employees of independent contractors as was owed to other invitees on the land, and that duty was not breached here. It was contended that under New Hampshire law the landowner owed a higher duty of care to employees of independent contractors while working on the land. The court held that Massachusetts law applied on the issue of duty of care. It can be said that here the defendant conformed its conduct to the standard required by Massachusetts law at least in the sense that a landowner, being generally familiar with the requirements of that state's law, would not expect to be required to take special precautions because an employee of an independent contractor was on the land. Thus, it would be fundamentally unfair to hold it to a different standard. As the court noted:

Nothing is more fixed than land, and hence, at least initially, the duties resulting from ownership. If the law of the residence of the visitor were to control, a landowner would be obliged to think in terms of the law of fifty states, not to mention foreign countries. Predictability does not point to the place of origin of the visitor. We believe in any broad sense it points directly to where the land from which the duty arose is located.

Id. at 1152.

268. 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

269. Although the New York court talked about post-accident changes in residence, it is difficult to seriously believe that the result would have been any different if the defendant was still a Maine resident at the time of the suit, particularly since the accident would be charged to the insurer's Maine loss experience in either circumstance.

270. As Professor Weintraub has demonstrated most clearly, insurers are not unfairly surprised by being held to liability under the law of a particular state. WEINTRAUB, *supra* note 219, at 205-06.

271. Moreover, the insurer was doing business in New York, and it would not be unfair for the New York courts, under a "benefit theory" to hold the insurer to the New York standard of liability whenever a New York resident was injured in

In contracts cases too, the forum generally has applied its own law once it concluded that it had a real interest in doing so, and in such cases the application of forum law produced no unfairness to the parties. For example, the state having an interest in applying the regulatory policy reflected in its insurance law will do so regardless of other factors that may be present in the case.²⁷² Similarly, the state having a policy designed to protect certain classes of persons from liability on contracts will apply that policy in favor of its resident defendants.²⁷³

In contract cases, there must be greater concern for possible unfairness because of the possibility that the parties may have justifiably relied on the law of a particular state in entering into the contract. However, where the contract is so connected with a particular state that it may be assumed that the parties relied on that state's law, another state usually will have no real interest in applying its law to regulate that contract. Nor does unfairness result when a state applies its policy designed to protect certain classes of persons from liability on contracts in favor of its resident who has entered into a contract elsewhere. Application of the law of the party's home state *on this issue* could have been foreseen by the other party at the time of entering into the contract. For example, in *Potlatch No. 1 Federal Credit Union v. Kennedy*,²⁷⁴ the Washington court applied Washington law to protect a Washington marital community from liability on a contract entered into in Idaho by the husband. The court noted that the Idaho creditor had known that he was dealing with residents of Washington and could have foreseen the application of Washington community property law to any claim he might assert against the community.²⁷⁵

A second reason for my advocating application of forum law whenever the forum has a real interest is that such application is the

another state by a vehicle that the company had insured. See Sedler, *Territorial Imperative*, *supra* note 160, at 406-07.

272. See, e.g., *Haines v. Mid-Century Life Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970); Sedler, *Contracts Provisions*, *supra* note 63, at 312-14.

273. See *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964); *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wash. 2d 806, 459 P.2d 32 (1969). The only exception in this area has been in regard to claims of usury, and some courts still apply a "rule of validity," even though this subverts the policy contained in its law that imposes strict sanctions for usury. See Sedler, *Contracts Provisions*, *supra* note 58, at 315-27.

274. 76 Wash. 2d 806, 459 P.2d 32 (1969). In a case such as *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964), there is no unfairness in applying the law of a party's home state on the question of incompetency, since one party to a transaction always takes the risk that the other party may turn out to be incompetent. The party can be expected to know where the other party resides, and in *Lilienthal*, if a credit check had been run in Oregon, the defendant's incompetency likely would have been revealed. See the discussion of this point in Currie, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 595, 603-04 (1968).

275. 76 Wash. 2d at 813, 459 P.2d at 37.

most effective and rational way to accommodate conflicting state interests. While this statement may seem paradoxical, it reflects the realities of conflicts litigation and of the behavior of the courts in practice. Stated bluntly, when courts have purported to apply "objective criteria" to the resolution of a true conflict, they have skewed the criteria in favor of the application of their own law.²⁷⁶ Recognition of the realities and of the dynamics of judicial behavior in the context of conflicts litigation leads to the conclusion that the best way to accommodate conflicting state interests is by the straightforward application of the law of the forum whenever it has a real interest in doing so. Such straightforward application will produce more comprehensible results than will attempts to resolve true conflicts by "objective criteria." Moreover, advancement of the interests of the different states will to an extent even out, since each state will have occasion to advance its own policies and interests in some cases.²⁷⁷

The skewing of "objective criteria" is most clearly demonstrated by the fact that courts, with few exceptions, have applied forum law whenever a real interest in doing so existed; this is true regardless of the approach that the court is purportedly following.²⁷⁸

276. As Professor Baxter has observed in arguing that the federal courts rather than the state courts should be determining the proper "sphere of application" of conflicting state laws:

The courts of each state are active participants in the formulation and implementation of local policies. To place in their hands extensive responsibility for deciding when those policies will yield to and when they will prevail over the competing policies of sister states seems unsound. Baseball's place as the favorite American pastime would not long survive if the responsibilities of the umpire were transferred to the first team member who managed to rule on a disputed event.

BAXTER, *supra* note 44, at 23.

277. However, since suit often can be brought in the state that has a real interest in applying its law in favor of the plaintiff, the balance will be struck in favor of the states whose laws on the whole protect plaintiffs. But the same state may have some rules of law that are plaintiff-oriented and other rules of law that are defendant-oriented, *e.g.*, a state may recognize comparative negligence, but may also have a guest statute.

278. Courts that purport to follow the *Restatement Second's* most significant relationship approach tend to emphasize the policy considerations outlined in § 6. These considerations include the "relevant policies of the forum [and the] other interested states and the relative interests of those states in the determination of the particular issue." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). Such courts tend to find that on the issue in question, their state is the state of the most significant relationship. *See, e.g.*, *Haines v. Mid-Century Life Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970); *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wash. 2d 806, 459 P.2d 32 (1969).

Courts that purport to follow Leflar's choice-influencing considerations approach emphasize the choice-influencing consideration of advancement of the forum's governmental interests. Leflar defines this consideration with reference to the forum's "total" governmental interests. *See* Leflar, *More on Choice-Influencing Considerations*, note 219 *supra*. The courts, however, define it with reference to the forum's interest in applying its own law in order to implement the policy reflected in that law, as Currie advocates, and apply their own law whenever they

An excellent example of such skewing is the decision of the California Supreme Court in *Bernhard v. Harrah's Club*.²⁷⁹ In that case, California had an interest in applying its policy of dram shop liability in favor of a California plaintiff injured in California. Nevada had an interest in applying its policy of protecting tavern owners from civil liability in favor of a Nevada tavern owner who acted in Nevada close enough to the California state line so that it was foreseeable that his serving of liquor to an intoxicated patron could cause harm in California. The California court purportedly applied the principle of comparative impairment to resolve this true conflict,²⁸⁰ and concluded that Nevada's policy would be "comparatively less impaired" if it were required to yield in the particular case.²⁸¹ Can it seriously be suggested that had the case been before the Nevada court, it would have agreed with the California court's conclusion as to "comparative impairment?" If it had, its behavior would have been very different from that of every other court faced with the situation where a resident defendant was sought to be held liable to a non-resident plaintiff under the law of the plaintiff's home state. In all of these cases the courts of the defendant's home state applied their own law to deny recovery.²⁸²

As the above discussion demonstrates, whenever the forum sees a real interest in applying its own law, it has a strong motivation to do so. Any purported means of resolving the true conflict, or indeed any approach to choice of law, is likely to be skewed in practice to bring about the application of the forum's law. Recognition of this reality supports the straightforward application of the forum's own law whenever it concludes that it has a real interest in doing so.

D. *The Unprovided-For Case*

It is the unprovided-for case that has given the courts the most difficulty in practice²⁸³ and, in Twerski's view, it is in the unpro-

see a real interest in doing so. See, e.g., *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974); *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968); *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 325 A.2d 778 (1974).

279. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976).

280. 16 Cal. 3d at 320-24, 546 P.2d at 723-26, 128 Cal. Rptr. at 219-22.

281. It noted that here the defendant had solicited business in California and that Nevada imposed criminal liability, although not civil liability, for serving liquor to intoxicated persons. 16 Cal. 3d at 322, 546 P.2d at 724-25, 128 Cal. Rptr. at 221. See also *Rosenthal v. Warren*, 374 F. Supp. 522 (S.D.N.Y. 1974), where the forum, after holding that it would apply its own law on the issue of charitable immunity because of its strong interest in allowing recovery to its resident plaintiff who died while a patient in a Massachusetts hospital, gratuitously noted that Massachusetts' charitable immunity rule was "regressive" and had since been repealed.

282. See, e.g., *Snow v. Continental Prod. Corp.*, 353 F. Supp. 59 (E.D. Wis. 1972); *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968); *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 325 A.2d 778 (1974).

283. When confronted with unprovided-for cases, which have been far more

vided-for case that interest analysis has "gone bankrupt."²⁸⁴ This is because, says Twerski, interest analysis is based primarily on the interests of the domicile of the parties in granting or allowing recovery, and, "when you run out of domiciliaries to protect you run out of interests."²⁸⁵ The real difficulty, however, arises not from the domicile-orientation of interest analysis, but from the fact that the unprovided-for case cannot be resolved solely with reference to the interests of the involved states because by definition neither state has an interest in applying its law on the point in issue. To put it another way, while Currie's interest analysis methodology can identify the unprovided-for case, it cannot as such provide a means for its resolution.

numerous than Currie anticipated, the practice of the courts has varied considerably. These cases generally involve automobile accidents where the plaintiff is from a non-recovery state and the defendant from a recovery state. When the accident occurs in the defendant's home state, the courts are likely to apply the law of that state allowing recovery. See *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); *Frummer v. Hilton Hotels, International, Inc.*, 60 Misc. 2d 840, 304 N.Y.S.2d 335 (Sup. Ct. 1969). Recovery would also be allowed in this situation under the third *Neumeier* rule.

When the accident occurs in the plaintiff's home state, however, the results and reasoning diverge. Some courts have allowed recovery, emphasizing that the law of the defendant's home state imposed liability. See *Decker v. Fox River Tractor Co.*, 324 F. Supp. 1089 (E.D. Wis. 1971); *Johnson v. Hertz*, 315 F. Supp. 302 (S.D.N.Y. 1970) (which would not be followed today in light of *Neumeier*); *Van Dyke v. Bolves*, 107 N.J. Super. 338, 258 A.2d 372 (App. Div. 1969); cf. *Allen v. Gannaway*, 294 Minn. 1, 199 N.W.2d 424 (1972); *Bolgrean v. Stich*, 293 Minn. 8, 196 N.W.2d 442 (1972) (center of gravity theory utilized). Other courts have denied recovery, emphasizing that the law of the plaintiff's home state did not provide for recovery. See *Patch v. Stanley Works*, 448 F.2d 483 (2d Cir. 1971); *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 385 N.Y.S.2d 64 (1972). *Ryan* was sharply questioned in *Hurtado*, 11 Cal. 3d at 586, 522 P.2d at 673-74, 114 Cal. Rptr. at 113-14, and it is doubtful if its reasoning would be followed today. In *Patch* a New Hampshire victim was killed in New Hampshire due to the negligence of a Connecticut defendant. New Hampshire law limited the amount recoverable for wrongful death; Connecticut law did not. The Second Circuit, sitting as a Connecticut state court, was required to apply New Hampshire substantive law, since Connecticut still follows the place of the wrong rule. The plaintiff argued that Connecticut would look to the "whole law" of New Hampshire, including its conflicts rules, and in this context, the Second Circuit concluded that New Hampshire would apply its own law on this issue and limit liability. 448 F.2d at 492.

Another approach has been to apply the law of the forum on the ground that this is the most rational solution to the problem. Such a rationale was advanced for the application of California law in *Hurtado*. See also *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973). Still another solution has been to look to the common policies of the involved states to find the means of resolution. See *Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973). Since *Neumeier* is the only clear case denying recovery, and since recovery has been allowed by most other courts, although the rationale has differed, I have formulated the rule of choice of law in this situation as one that allows recovery: When a plaintiff from a non-recovery state is involved in an accident with a defendant from a recovery state, recovery generally will be allowed irrespective of where the accident occurred. Sedler, *Rules of Choice-of-Law*, *supra* note 3, at —.

284. Twerski, *Emperor's Clothes*, *supra* note 144, at 104.

285. *Id.* at 108.

My own view is that the unprovided-for case can be resolved by looking to the common policy of the involved states.²⁸⁶ While this view finds its roots in Currie's concern with "non-discrimination,"²⁸⁷ I have developed it along different lines and have tried to loosen it from any constitutional underpinnings. Usually the point as to which the laws of the involved states differ will involve a substantive rule that is an exception to the common policy reflected in what may be called the general law of both states. Since the state whose law represents an exception to that common policy has no interest in having its law applied in the circumstances of the particular case,²⁸⁸ it is submitted that the common policy should come to the fore, and the exception should not be recognized.

Typical of such an exception to the common policy of the involved states is guest statute immunity. All states allow recovery for negligence, but some make an exception when the victim is a passenger in the host's automobile by requiring a higher standard of proof in that situation. The only state interested in allowing that exception is the defendant's home state and when it does not do so, the common policy of both states in favor of recovery should prevail. The same is true of other defenses such as family immunity and limitations on wrongful death recovery,²⁸⁹ which should not be recognized when they do not exist under the law of the defendant's home state.²⁹⁰ By the same token, protective immunities in the contract situation, such as incompetency or spendthrift immunity, represent an exception to the common policy of enforcing contracts, and likewise should not be recognized if they do not exist under the law of the defendant's home state.

The common policy rationale does not require going beyond the policies and interests reflected in the laws of the involved states. The only interest with which a court applying interest analysis should be concerned is the interest of a state in applying its law in order to implement the policy reflected in that law. Just as there is no difficulty in determining the policy behind a state's rule of substantive law, there is no difficulty in determining the common policy reflected in the "general law" of the involved states. And,

286. See Sedler, *Interstate Accidents*, *supra* note 56, at 137-42. The common policy rationale was accepted in *Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973).

287. See Sedler, *Interstate Accidents*, *supra* note 56, at 143-49 (discussion of Currie's views as to non-discrimination).

288. See notes 259-71 & accompanying text *supra*.

289. Professor Weintraub disagrees with the utility of the common policy rationale in the wrongful death context on the ground that there are significant variations in the way that different states compute wrongful death damages. Weintraub, *A Response to the Critiques of Professors Sedler, Twerski and Walker*, 57 IOWA L. REV. 1258, 1259-60 (1972).

290. Compare the discussion of the "altruistic interest" of the defendant's home state in allowing recovery to any person injured by the defendant in Scoles, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 563, 567-68 (1968), with Ratner, *Choice of Law: Interest Analysis and Cost Contribution*, 47 S. CAL. L. REV. 817, 832-37 (1974).

ultimately, there is no difficulty in making the choice of law decision: When a defendant from a liability state asserts a defense representing an exception to the common policy of both states in imposing liability, the defense should not be recognized because the only state interested in providing an exception to the common policy of both of the involved states does not do so.

The common policy rationale, it is submitted, not only provides a proper and sound method for resolving the unprovided-for case that is fully consistent with the underlying premises of interest analysis, but its adoption by the courts would clear up the confusion that now exists with regard to resolution of the unprovided-for case.²⁹¹

E. *Some Other Aspects of Interest Analysis*

In the context of this reformulation of Currie's governmental interest approach, it seems appropriate to discuss some other aspects of interest analysis that bear strongly on determining real interests. Specifically, the time at which the interests of the involved states should be determined will be discussed as will the matter of "combining" the laws of the different states in a manner that achieves a result which would not be possible if the law of either state were applied in its entirety.

1. The Time for Determining Interests

The issue of the time at which the interests of the involved states should be determined arises primarily when there are post-transaction changes in residence.²⁹² As a result of such changes, the interests of the originally involved states may be altered from what they were at the time of the transaction, and the state of a party's new residence may now have an interest in applying its law on the point in issue.²⁹³ For example, if the plaintiff or the beneficiaries of a deceased accident victim changed residences, governmental concern for the welfare of the accident victim and of the beneficiaries

291. Note that in practice, however, despite the differing rationales, most courts have allowed recovery. See note 283 *supra*.

292. By "post-transaction," I am referring to changes that occurred after the claim arose. Where a change of residence occurs after a contract has been entered into, but before the loss is suffered, there is no question but that interests should be determined as they exist at the time of the loss. See *Clay v. Sun Life Ins. Office, Ltd.*, 377 U.S. 179 (1964).

293. As a practical matter, the change in interests in the accident situation will generally result only from the plaintiff's change of residence. If the defendant changes residence, the accident will be charged to the loss experience of the state of his or her former residence, since loss experience looks to the state where the vehicle was insured at the time the accident occurred. This is why I do not consider the post-accident change of residence significant in *Miller v. Miller*. See note 269 *supra*. The same is true of the post-accident change of residence in *Dorion v. Dorion*, 109 N.H. 1, 241 A.2d 372 (1968), where after the accident the spouses moved from a state that did not recognize spousal immunity to a state that did.

would correspondingly shift to the state of their new residence. Likewise, where an insured's beneficiary changes residence after the insured's death, the state of the new residence is the state interested in whether recovery will be allowed on the insurance policy. These illustrative situations will be used to discuss the significance of post-transaction changes of residence and the problem of the time at which interests should be determined.

Some courts have been unwilling to consider post-transaction changes in residence and have determined the interests of the involved states as they existed at the time of the transaction.²⁹⁴ Others, however, have looked to the interests in light of post-transaction changes.²⁹⁵ The failure to consider post-accident changes of residence does not matter in some cases,²⁹⁶ but it could make a very marked difference in a case such as *Gore v. Northeast Airlines*.²⁹⁷ In *Gore*, the plaintiff moved after the accident from the recovery state where the action was brought to a non-recovery state. The defendant resided throughout in a non-recovery state. In terms of the interests of the states where the parties reside, the change of residence converted the case from one where the forum has a real interest in applying its law to a case where the forum does not have a real interest in applying its law, but another state does. Conversely, if the plaintiff had moved from a non-recovery to a recovery state, the recovery state would then have had a real interest in applying its law in favor of its new residents, since the consequences of allowing or not allowing recovery would be felt in that state.

In *Gore*, the forum refused to take the post-accident change of residence into account, and applied its own law allowing recovery. The court said that looking to interests as they existed at the time of the accident would prevent "forum shopping." Although this reasoning would not apply to *Gore* since the new domicile provided a lesser recovery,²⁹⁸ Professor Weintraub maintains that the result in

294. See *Tiernan v. Westtext Transport, Inc.*, *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967); 295 F. Supp. 1256 (D.R.I. 1969); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Dorion v. Dorion*, 109 N.H. 1, 241 A.2d 372 (1968).

295. In addition to *Miller*, where the change did not affect the interest mix, the court did so in *Kjeldsen v. Ballard*, 52 Misc. 2d 952, 277 N.Y.S.2d 324 (Sup. Ct. 1967), and *Manning v. Hyland*, 42 Misc. 2d 915, 249 N.Y.S.2d 381 (Sup. Ct. 1964). In these two cases, the accident victim subsequently married the defendant and moved to the defendant's home state, which recognized spousal immunity. The courts applied the law of the new domicile and barred the suit.

296. See *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), where the beneficiaries moved from one recovery state to another, and which presented a false conflict in any event, since the defendant was also from a recovery state.

297. 373 F.2d 717 (2d Cir. 1967).

298. See WEINTRAUB, *supra* note 219, at 250.

that case was correct: The widow should not be discouraged from making a move "otherwise in the best interests of herself and the children" for fear of "reducing compensation for the defendants by many hundreds of thousands of dollars."²⁹⁹ In the converse situation, however, where the victim or beneficiaries move from a non-recovery to a recovery state, Professor Weintraub suggests that it might be proper to look to the law of the new domicile, at least where it is unlikely that the move was made "in order to influence the choice of applicable law."³⁰⁰

Professor Seidelson, on the other hand, argues that the change of domicile should be taken into account in both situations: The change of domicile does significantly affect the interests of the involved states, and to ignore this would "constitute a perversion of interest analysis." As he states, "It would impose upon a court, purporting to resolve a choice of law problem by rational consideration of the legitimate interests of the states involved, a non-fact: that the widow is domiciled in one state when in law and in fact she is domiciled in another. That kind of indulgence in fiction is contrary to the very essence of interest analysis."³⁰¹ In *Gore*, he would apply the law of the beneficiaries' new domicile to limit the amount of recovery.³⁰² When the victim or the beneficiaries moved from a non-recovery to a recovery state, Seidelson would, without qualification, advocate application of its own law by the state of the new domicile. Such recovery would not be unfair to the defendant, since the defendant could not reasonably have anticipated "unchanged domiciles."³⁰³

As the above discussion indicates, the interest and fairness test justifies consideration of post-transaction changes of residence in the accident situation because (1) only the new domicile has any interest in allowing tort recovery for the victim or the beneficiaries, and (2) application of the law of that state is not unfair, either to the victim or the beneficiaries in the event that the move is to a non-recovery state, or to the defendant or the insurer in the event that the move is to a recovery state.³⁰⁴

299. *Id.*

300. *Id.* at 251-52.

301. Seidelson, *Interest Analysis and an Enhanced Degree of Specificity: The Wrongful Death Action*, 10 DUQ. L. REV. 525, 531 (1972).

302. *Id.* at 533-35. Once the change of domicile is recognized, there is no conflict of laws, since both the law of the plaintiff's home state and the law of the defendant's home state limit recovery.

303. *Id.* at 537. It may also be noted that the point in issue, *i.e.*, the amount recoverable for wrongful death, does not involve reliance on the law of a particular state. See also Note, *Post Transaction or Occurrence Events in the Conflict-of-Laws*, 69 COLUM. L. REV. 843, 850 (1969) [hereinafter cited as *Occurrence Events*].

304. An illustration of taking post-accident change of residence into account is *Kieldsen v. Ballard*, 52 Misc. 2d 952, 227 N.Y.S.2d 324 (Sup. Ct. 1967). At the time of the accident, which occurred in New Jersey, the plaintiff was a resident of New York, which did not recognize spousal immunity, and the defendant, her fiancé,

Assuming the correctness of this reasoning, if post-accident changes of residence are not to be considered it must be because of factors other than those relating to the policies and interests of the involved states. Such a factor arises when the victim or the beneficiaries have moved from a recovery to a non-recovery state. It is socially undesirable, as Professor Weintraub points out, to discourage moves which may be in the best interests of the survivors; in fact, to do so would be inconsistent with the national policy encouraging movement from one state to another that is reflected in the constitutional right to travel.³⁰⁵ For this reason, the post-accident change of residence should not be taken into account when the victim or the survivors move from a recovery to a non-recovery state. However, when the movement is from a non-recovery to a recovery state, the new domicile should apply its law because it now has a real interest in doing so, and because the application of its law is not unfair to the defendant or insurer, who did not "rely" on the law of the victim or beneficiaries' former domicile in any way whatsoever.

When a change of residence occurs in a contract situation, the matter of fairness in looking to the law of the newly interested state is presented much more strikingly, and is the framework within which the question should be approached. The court should look to the interest of the state of the new residence, unless this would be unfair to the other contracting party. In *Clay v. Sun Insurance Office, Ltd.*³⁰⁶ for example, the change in residence occurred after the contract was entered into but before the loss was suffered. Thus, no unfairness resulted from application of the law of the insured's new domicile to hold invalid a "built-in" statute of limitations provision in the insurance contract which was valid under the law of the insured's former domicile. The insurance contract was of the "floater" variety, covering the property wherever it was situated, so the insurer could anticipate that it would be taken into another state.³⁰⁷

was a resident of Virginia, which did. The parties subsequently married, and the plaintiff changed her domicile to Virginia. Under Virginia law spousal immunity extended to antenuptial torts. Emphasizing the lack of any present New York interest in the question, the New York court held that Virginia law applied on the issue of spousal immunity. To the same effect is *Manning v. Hyland*, 42 Misc. 2d 915, 249 N.Y.S.2d 381 (Sup. Ct. 1964).

305. It is not suggested, however, that the application of the law of the new domicile to deny recovery would be unconstitutional. *Cf. Sosna v. Iowa*, 419 U.S. 393 (1975) (holding one year residency requirement for divorce not violative of constitutional right to travel).

306. 377 U.S. 179 (1964).

307. *Cf. Quartly v. Insurance Co. of N. America*, 244 So. 2d 181 (Fla. App. 1971), in which the court held that the statute involved in *Clay* did not apply when the insured changed his domicile to Florida after the loss occurred.

Now suppose that after the death of the insured on a life insurance contract, the family moved to another state in which suit for recovery on the policy is brought. The insurer defends on the basis of a provision in the insurance contract that is valid under the law of the former domicile, but invalid under the law of the new domicile. In this situation, the new domicile clearly has a real interest in applying its law to determine the validity of the provision because of the consequences that denial of recovery may have on the insured's family, who are now its concern. This was the situation presented in *John Hancock Mutual Insurance Co. v. Yates*.³⁰⁸ The contract was entered into in New York, where the insured resided until his death. Under New York law a false representation as to prior medical care enables the insurer to avoid liability on the contract. Suit was brought in Georgia, where the beneficiaries moved after the insured's death. The Georgia court, while conceding that New York substantive law applied,³⁰⁹ held that as a matter of "procedure", it was for the jury to decide whether the false representation was "material". The jury found that it was not. The Supreme Court quite properly found a denial of full faith and credit to New York law, which admittedly was "substantively applicable," since the so-called "procedural" determination would alter the substantive nature of the claim.

It may be asked whether the same result would have been obtained if Georgia had applied its own substantive law on the ground that it now had a real interest in determining the question of the insurer's liability on the contract. One commentator has suggested that effect cannot be given to a "post-occurrence change in law"³¹⁰ if the conduct of one of the litigants "would have been different if the present rule had been known and the change foreseen."³¹¹ Applying this principle to the situation in *Yates*, it would seem that the application of Georgia law to determine the particular question that was in issue would have been unfair.³¹² In reliance on

308. 299 U.S. 178 (1936).

309. On the ground that it was the place where the contract was made.

310. This refers to a change of residence after the accident or loss occurred.

311. *Occurrence Events*, *supra* note 303, at 855.

312. And, it is submitted, unconstitutional under the interest and fairness test set forth in *Clay*. Currie dealt with this situation by drawing an analogy to retroactive application of statutes for domestic purposes: If a state could not properly apply its legislation retroactively to prior transactions, it could not, in the choice of law context, apply its own law in the choice of law context. *The Verdict of Quiescent Years*, in CURRIE, *supra* note 1, 621 (article originally published at 28 U. CHI. L. REV. 258 (1961)); *Conflict, Crisis and Confusion in New York*, in CURRIE, *supra* note 1, at 736-39 (article originally published at 1963 DUKE L.J. 1); Currie, *Full Faith and Credit*, *supra* note 1, at 98-99. See also the discussion of *Yates* in CURRIE, *supra* note 1, 235-36. These situations differ, however. See Hill, *supra* note 8, at 494-96; Traynor, *supra* note 42, at 867-73, and Currie's analysis of this situation appears very questionable.

But unfairness results only because the change of residence occurred after the

New York law, the insurer would assume that it did not have to be concerned about the accuracy of the information contained in the insured's application until the insured died and a claim was made by the beneficiaries. At that time it could assert the provisions of New York law absolutely voiding the contract because of false representations as to prior medical care, whether material or not. If a different standard were to be applied, the insurer presumably would have taken steps to cancel the policy at an earlier time when proof of materiality was more likely to have been available.

Suppose, however, that the particular question in issue was the validity of a suicide provision contained in the insurance contract and that at all times the insured was domiciled in State *A*, under whose law the insurer was not liable in the event of suicide. After the insured committed suicide, the beneficiaries moved to State *B*, under whose law suicide does not relieve the insurer of the obligation to pay unless it occurred within one year after the issuance of the policy, which was not the case here. In this situation the application of State *B* law on the issue of the validity of the suicide provision would not be unfair to the insurer. With regard to the suicide provision, regardless of which state's law applied to determine its validity, the insurer's conduct would not "have been different if the present rule had been known and the change foreseen."³¹³ Since State *B* now has a real interest in applying its law on the point in issue, and since the application of its law on this point is not unfair to the insurer, it should apply its own law.³¹⁴

In summary, the interests of the involved states should generally be determined as they exist at the time the case is presented to the court, and when subsequent changes in residence produce a mix of interests different from those existing at the time of the transaction,

insured had died. *Cf. Occurrence Events*, *supra* note 303, at 854, where it is argued that in *Yates*, "[i]t might be thought unfair for an insurance company not to know the extent of its liability for its agent's actions and thus the amount of supervision required."

313. See text accompanying note 311 *supra*.

314. In *Berkran v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), the court indicated that if the decedent were a Nevada domiciliary at the time the contract was entered into, California could not apply its statute of frauds pertaining to wills in the event that the insured changed his domicile to California prior to his death. 55 Cal. 2d at 594-95, 360 P.2d at 909, 12 Cal. Rptr. 269. See *Horowitz*, *supra* note 44, at 772-74. Currie also maintains that the new domicile should not and probably constitutionally could not apply its law in this situation. *Unconstitutional Discrimination in the Conflict-of-Laws: Privileges and Immunities*, in *CURRIE*, *supra* note 1, at 457-59 (article originally published at 69 *YALE L.J.* 1323 (1960)). Here I would disagree. As in *Clay*, the other party was not entitled to expect that the promisor would not effect a change of domicile, and since the contract would not be enforceable until the promisor died, that party took the risk that the promisor would die domiciled in a state that did not enforce such contracts. There is certainly no unfairness in applying the law of the decedent's domicile at the time of death to determine the validity of a contract to will executed during the decedent's lifetime even if the decedent was domiciled elsewhere at the time of execution.

the new interests should be the ones considered by the court. Exceptions should be made only where this general rule would produce unfairness, or where other considerations, such as the national policy of encouraging movement from one state to another, militate against taking post-transaction changes of residence and resulting changes of interest into account.

2. Combining the Laws of the Different States

This aspect of interest analysis involves the possibility of applying the laws of different states to different issues in a case in a manner that achieves a result that would not be possible if the law of either state were applied in its entirety. The possibility of combining laws is illustrated by a case posited by Professor Cavers, in which a New York plaintiff is injured on a trip in Massachusetts sponsored by a New York charity. After its New York registered vehicle breaks down, the charity rents a vehicle in Massachusetts, which is not registered as required by Massachusetts law. The injury results from an accident involving this vehicle. The driver of the vehicle would not be considered guilty of negligence under either New York or Massachusetts law. Under Massachusetts law, however, the operator of an unregistered vehicle would be strictly liable for all harm resulting from the operation of the vehicle. Massachusetts recognizes charitable immunity; New York does not.³¹⁵ If New York law applies on the issues of liability and immunity, the defendant will prevail because its conduct would not be actionable. If Massachusetts law applies in its entirety, the defendant would prevail on grounds of charitable immunity.

Assume that the plaintiff brings suit in Massachusetts. Only New York has a real interest in applying its law on the issue of charitable immunity, since the charity is a New York charity carrying on its good works for residents of that state. On the issue of substantive liability, however, both states have a real interest. New York is interested in applying its rule in order to protect a New York defendant from what it considers to be unwarranted liability. But Massachusetts is equally interested in applying its strict liability rule in order to implement the admonitory policy reflected in that rule, since the conduct that it desired to prevent—driving an unregistered vehicle—occurred in Massachusetts. Only if the Massachusetts court determines its real interests separately with respect to liability and immunity can it achieve a sound result. Because Massachusetts does not have a real interest in applying its charitable immunity law, it should apply New York law on that issue. The forum's rule of substantive liability should be applied, on the other hand, because Massachusetts does have a real interest in applying its law on that

315. This is the "imaginary case" posited in CAVERS, *supra* note 136, at 34-43.

issue. The combination of New York and Massachusetts law produces no unfairness to the defendant. The charity, a New York corporation, was subject to New York's law on charitable immunity, and thus was insured for tort liability. Similarly, it acted in Massachusetts, so as to bring itself within the scope of Massachusetts' admonitory policy. In effect, the defendant can be charged with foreseeing the possibility of this combination of laws, resulting in the imposition of liability here.³¹⁶

It is now generally recognized that choice of law is a choice between the differing laws of the involved states rather than a choice between states.³¹⁷ This important distinction comes out most clearly when the choice of law decision is made with reference to the policies and interests of the involved states. That different states have real interests in applying their law to different issues in a case justifies combining laws to reach a result that would not be possible if one state's law were applied in its entirety.

CONCLUSION

The governmental interest approach to choice of law formulated by the late Brainerd Currie has, indeed, been the catalyst of the modern revolution in conflicts law in this country. It is the approach that in practice has found the greatest favor with courts committed to a policy-centered view of choice of law. Most important, the approach has produced sound and fair results.

This re-analysis and reformulation of Currie's approach springs not only from my belief in the superiority of interest analysis,³¹⁸ but also from my desire that the future development of choice of law in this country will proceed within the framework Currie pioneered. It is my hope that I have made some contribution to that development with this Article.

316. If suit had been brought in New York, New York should apply its law on both issues and hold that the charity is not substantively liable.

317. See CAVERS, *supra* note 136, at 122-42.

318. As David Currie has observed: "Interest analysis, like other methods of approaching choice of law, is not perfect. But it has the virtue of recognizing that laws are adopted in order to accomplish social goals and that they should be applied as to carry out their purposes." Currie, *Comments on Reich v. Purrell*, *supra* note 274, at 605.